



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF K.A.B. v. SWEDEN

(Application no. 886/11)

JUDGMENT

STRASBOURG

5 September 2013

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of K.A.B. v. Sweden,

The European Court of Human Rights (Fifth Section), sitting as a Chamber composed of:

Mark Villiger, *President*,
Angelika Nußberger,
Boštjan M. Zupančič,
Ann Power-Forde,
Ganna Yudkivska,
Helena Jäderblom,
Aleš Pejchal, *judges*,

and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 2 July 2013,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 886/11) against the Kingdom of Sweden lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Somali national, Mr K.A.B. (“the applicant”), on 29 December 2010. The President of the Section acceded to the applicant’s request not to have his name disclosed (Rule 47 § 3 of the Rules of Court).

2. The applicant was represented by Mr C. Kennedy Nordqvist, a lawyer practising in Gothenburg. The Swedish Government (“the Government”) were represented by their Agent, Mrs H. Kristiansson, of the Ministry for Foreign Affairs.

3. The applicant alleged, in particular, that an implementation of the deportation order to return him to Somalia would be in violation of Articles 2 and 3 of the Convention.

4. On 25 January 2011 the President of the Third Section decided to apply Rule 39, indicating to the Government that it was desirable in the interests of the parties and the proper conduct of the proceedings that the applicant should not be deported to Somalia until further notice.

5. On 1 February 2011 the Court changed the composition of its Sections (Rule 25 § 1) and the present application was assigned to the newly composed Fifth Section.

6. On 22 September 2011 the application was communicated to the Government.

7. On 21 March 2013 it was decided to invite the parties to submit further written observations on the admissibility and merits of the application which should deal, in particular, with the present security situation in Mogadishu and whether recent changes had had an impact on

the risks allegedly facing the applicant if he was ultimately returned to Somalia.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The applicant was born in 1960. He entered Sweden on 18 April 2009 and requested asylum on 24 April 2009. Before the Migration Board (*Migrationsverket*) he submitted that he had been born in Mogadishu and had lived there all his life, with the exception of a few years when, as a child, he had lived in the village of Baydhabo, 250 km northwest of Mogadishu. He belonged to the Sheikal clan and had been trained as a teacher. Between 1992 and 2005 he had worked as an administrator for the American Friends Service Community, an organisation providing humanitarian service, which had closed in 2005 because of the security situation. In the period from 2005 until 2009 he had worked as a teacher in his home. In 2007 he had received threatening telephone calls from people claiming to represent the Islamic courts, telling him to stop spreading Christianity. The applicant had told them that he had stopped working for the American Friends Service Community and that he was a Muslim but that had made no difference. When the conflicts between the Islamist courts and the Ethiopian troops had escalated, the telephone calls had stopped for a while. At the beginning of 2009 the applicant had received more threatening telephone calls, but this time from al-Shabaab, with a similar message as before. On 2 March 2009 members of al-Shabaab had gone to the applicant's home and asked for him. He had not been at home at the time but had immediately decided to leave the country when he heard that they had been looking for him. His wife and children had still been in Mogadishu when he left the country but had later also left the city. The applicant claimed that, upon return, he would risk serious assault by al-Shabaab and that he would not be able to obtain any protection from his clan.

9. In an interview held by the Migration Board on 5 May 2009, the applicant stated that five children from his first marriage had been living in Hargeysa, in Somaliland, the last time he had heard from them. In a submission to the Board of 22 May 2009 he stated that one daughter from his second marriage had been threatened and had consequently travelled north to be with relatives. In an interview held by the Board on 2 June 2009 he submitted that his daughter from his second marriage had fled to Hargeysa but he denied having said that his children from his first marriage were living there.

10. In its decision of 18 September 2009 the Migration Board noted that the applicant had given a detailed and coherent story about his clan affiliation and thus had made his identity credible. Furthermore, it could be assumed that he originated from Somalia, which was supported by the language analysis undertaken. Therefore, the Board held that the applicant's asylum claims were to be examined on the basis of a return to Somalia. It found that the possibility for a clan to give protection to its members had deteriorated due to the political development in Somalia where Islamist groups had come to play a more important role. It also pointed out that al-Shabaab was the most influential group and had developed in a fundamentalist direction. The Board noted that al-Shabaab had destroyed the traditional protection which clans could usually provide to their members. It further noted that clan protection in general was not reliable in Mogadishu.

11. The Board found that it could not rely on the documents submitted by the applicant, namely a certificate of employment and an identity card which was no longer valid, in assessing his asylum needs. It therefore had to assess the credibility of his oral submissions. The Board found that the applicant's submissions about his Mogadishu origins were credible. However, he had not made it credible that he had resided in Mogadishu in the years prior to his arrival in Sweden. The Board noted that the submissions about his place of residence did not correspond to the information given by his brother to the Migration Board on 16 September 2002 (who had stated that of his four brothers, one was living in Great Britain, one in the Netherlands, one in Afgoye and one as a nomad in Somalia, but none in Mogadishu). Moreover, when the applicant's nephew's wife had applied for a residence permit in Sweden on 25 June 2008 she had submitted that she and the applicant had been neighbours in Addis Ababa, Ethiopia. Furthermore, the Board found the applicant's submissions regarding the alleged threats from the Islamic courts and al-Shabaab to be vague and lacking in detail. In the light of that, and the fact that he was supposed to have received the alleged threats in a period during which he had not substantiated that he had been residing in Mogadishu, the Board concluded that he had failed to substantiate a well-founded fear of persecution. Consequently, the Board rejected his application for asylum.

12. During the proceedings before the Migration Court (*Migrationsdomstolen*) the applicant further submitted that he believed that his family was still in Mogadishu. He stated that his daughter did not live in Somaliland any more. She had fled because she had felt threatened by civilians living there. The Board, in reply, held that the applicant's story was not credible. It further submitted that it was possible for him to relocate to Hargeysa where his first wife and their children were living.

13. On 25 February 2010 the Migration Court, after having held an oral hearing in the case, upheld the Board's decision. The court found that the

applicant had not proved his identity but that it was clear that he had a background in southern or central Somalia. The court stated that there was no reason to question that he had been living in Mogadishu for periods of his life. He had submitted a certificate of employment from the American Friends Service Community to substantiate that he had worked in Mogadishu from 1992 until 2005. However, the court found that since he had failed to substantiate his identity this document had very little evidential value. It further stated that he had not submitted any documents or particulars to substantiate that he had been living in Mogadishu between 2006 and 2009.

14. Moreover, the court found that the applicant had not given an adequate explanation of why his relatives' submissions about his habitual residence did not correspond to his own submissions. In its view, the information given by the applicant about his trips to Ethiopia, where he allegedly had travelled for his nephew's wedding and for business, lacked credibility. It concluded that the applicant had not made it credible that he had been living in Mogadishu during the years prior to his travel to Sweden and that it was unclear where in Somalia he had been living. In the light of that, and since his case had not been considered on the basis of a return to Ethiopia, the court held that the application for asylum should be examined on the basis of a return to Somalia as a whole.

15. The court further found that the applicant's submissions regarding his work for the American Friends Service Community had been very vague and lacking in detail. He had not been able to submit information about the exact nature of his work for the organisation or other specific details of the work. Moreover, it was not clear how representatives of the Islamist courts and later al-Shabaab had become aware of his work for the organisation and why they had started to threaten him such a long time after he had stopped working there. The court thus found that the applicant had failed to substantiate being at a real and personal risk upon return to Somalia and rejected the appeal.

16. Before the Migration Court of Appeal (*Migrationsöverdomstolen*), the applicant submitted a driving licence, a certificate to prove that he owned land and receipts of paid telephone bills in order to substantiate that he had been living in Mogadishu before he had left for Sweden. He also submitted receipts showing that he had sent money to his wife in Mogadishu and a DHL bag to show that his wife had sent the documents to him from Mogadishu and, therefore, that she lived there.

17. On 7 July 2010 the Migration Court of Appeal refused leave to appeal.

18. The applicant subsequently claimed that there were impediments to his deportation and requested that his application for a residence permit be examined anew. His request was refused by the Migration Board on 25 August 2010 and on 14 September 2010 the Migration Court rejected his

appeal. The applicant again submitted such a claim which was rejected by the Migration Board and the Migration Court on 23 May 2011 and 11 July 2011, respectively. Copies of these decisions have not been submitted to the Court.

II. RELEVANT DOMESTIC LAW AND PRACTICE

19. The basic provisions applicable in the present case, concerning the right of aliens to enter and to remain in Sweden, are laid down in the 2005 Aliens Act (*Utlänningslagen*, 2005:716 – hereafter referred to as “the 2005 Act”).

20. An alien who is considered to be a refugee or otherwise in need of protection is, with certain exceptions, entitled to a residence permit in Sweden (Chapter 5, section 1 of the 2005 Act). The term “refugee” refers to an alien who is outside the country of his or her nationality owing to a well-founded fear of being persecuted on grounds of race, nationality, religious or political beliefs, or on grounds of gender, sexual orientation or other membership of a particular social group and who is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country (Chapter 4, section 1). This applies irrespective of whether the persecution is at the hands of the authorities of the country or if those authorities cannot be expected to offer protection against persecution by private individuals. By “an alien otherwise in need of protection” is meant, *inter alia*, a person who has left the country of his or her nationality because of a well-founded fear of being sentenced to death or receiving corporal punishment, or of being subjected to torture or other inhuman or degrading treatment or punishment (Chapter 4, section 2).

21. Moreover, if a residence permit cannot be granted on the above grounds, such a permit may be issued to an alien if, after an overall assessment of his or her situation, there are such particularly distressing circumstances (*synnerligen ömmande omständigheter*) to allow him or her to remain in Sweden (Chapter 5, section 6). Special consideration should be given, *inter alia*, to the alien’s health status. According to the preparatory works (Government Bill 2004/05:170, pp. 190-191), life-threatening physical or mental illness for which no treatment can be given in the alien’s home country could constitute a reason for the grant of a residence permit.

22. As regards the enforcement of a deportation or expulsion order, account has to be taken of the risk of capital punishment or torture and other inhuman or degrading treatment or punishment. According to a special provision on impediments to enforcement, an alien must not be sent to a country where there are reasonable grounds for believing that he or she would be in danger of suffering capital or corporal punishment or of being subjected to torture or other inhuman or degrading treatment or punishment

(Chapter 12, section 1). In addition, an alien must not, in principle, be sent to a country where he or she risks persecution (Chapter 12, section 2).

23. Under certain conditions, an alien may be granted a residence permit even if a deportation or expulsion order has gained legal force. This is the case where new circumstances have emerged which indicate that there are reasonable grounds for believing, *inter alia*, that an enforcement would put the alien in danger of being subjected to capital or corporal punishment, torture or other inhuman or degrading treatment or punishment or there are medical or other special reasons why the order should not be enforced (Chapter 12, section 18). If a residence permit cannot be granted under these criteria, the Migration Board may instead decide to re-examine the matter. Such a re-examination shall be carried out where it may be assumed, on the basis of new circumstances invoked by the alien, that there are lasting impediments to enforcement of the nature referred to in Chapter 12, sections 1 and 2, and these circumstances could not have been invoked previously or the alien shows that he or she has a valid excuse for not having done so. Should the applicable conditions not have been met, the Migration Board shall decide not to grant a re-examination (Chapter 12, section 19).

24. Under the 2005 Act, matters concerning the right of aliens to enter and remain in Sweden are dealt with by three instances: the Migration Board, the Migration Court and the Migration Court of Appeal.

25. The Migration Court of Appeal, in a judgment of 24 February 2011 (UM 10061-09) concerning another asylum seeker from Somalia, referred to unspecified country information and stated that the security situation in Somaliland was at an acceptable level. It also stated that the internal flight alternative to Somaliland was available to those who originated from the area or had another connection to it.

26. As to the situation in Mogadishu, the Migration Court of Appeal, in a judgment of 6 October 2009 (MIG 2009:27), found that there was at that time a situation of armed conflict in Mogadishu. In its judgment of 24 February 2011 (MIG 2011:4) it found that this was the situation for all south and central Somalia.

27. The Migration Board, in its legal position document (*rättsligt ställningstagande*) of 13 November 2012 regarding the security situation in Somalia referred to, among other things, the Swedish Migration Board Country Information Service (Lifos) report of 24 October 2012, "The Security Situation in Somalia" (see paragraph 35 below). It noted that al-Shabaab no longer held any military power in Mogadishu and there was at present no general conflict or fighting on the streets of the city. Moreover, it noted that the improved security situation had now led to people returning to the city and humanitarian organisations had been able to establish themselves in the area again. The Migration Board also noted that there was significant political instability in the city and no functioning public

administration. It concluded that it could no longer be considered that everyone who was present in the city would be at risk of persecution or ill-treatment on the ground of the general security situation and the level of conflict was no longer such as to consider it to be a situation of armed conflict. However, in the light of the political instability and the lack of functioning public administration, a high level of criminality and the occurrence of security incidents that were harmful to the civilians, it found that the present security situation was one of severe conflict (*svåra motsättningar*).

III. RELEVANT COUNTRY INFORMATION

A. Mogadishu

28. UNHCR's Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Somalia ("the Eligibility Guidelines") were published on 5 May 2010. The Eligibility Guidelines noted that over the last three years there had been a consistent failure by all parties to respect basic principles of international humanitarian law, resulting in civilians regularly being caught in the cross-fire. Indiscriminate bombardment and military offensives were carried out in civilian areas with little or no regard for the rules of war and road-side and vehicle-borne bombs, grenade attacks in civilian areas, and deliberate attacks on civilian targets were all too frequent. Hospital records indicated that there were over 900 civilian casualties in Mogadishu in March and April 2010. Other estimates suggested that between 20 and 50 civilians were killed in Mogadishu each week.

29. While the armed conflict was a major cause of displacement, the report noted that increasing numbers of Somalis were fleeing due to fear of persecution linked to the recent political and human rights situation. Others feared persecution due to perceived or actual contravention of traditional Somali social norms and practices. These groups included members of minority clans, women of specific profiles, victims of blood feuds, Christian converts, and lesbian, gay, bisexual and transgender individuals.

30. Consequently, UNHCR concluded that the widespread disregard of their obligations under international law by all of the parties to the conflict and the reported scale of human rights violations made it clear that any person returned to southern and central Somalia would, solely on account of his or her presence there, face a real risk of serious harm. Moreover, UNHCR considered that there was no internal flight alternative available inside southern and central Somalia.

31. The report further noted that effective State protection was unavailable in southern and central Somalia given the situation of armed conflict and the inability of the Government authorities to extend control

over any territory outside a few districts in Mogadishu. Moreover, since 2007 clan protection had been undermined in Mogadishu and increasingly in other regions of southern and central Somalia by the ongoing conflict and by the diminution of the traditional clan systems of justice due to the favoured strict interpretations of Sharia law being implemented by al-Shabaab and Hizbul Islam in areas under their control

32. In *AMM and others (conflict – humanitarian crisis – returnees – FGM) Somalia* CG [2011] UKUT 00445 (IAC) the United Kingdom Upper Tribunal stated the following under the heading “Country Guidance Mogadishu”:

“Despite the withdrawal in early August 2011 of Al-Shabab conventional forces from at least most of Mogadishu, there remains in general a real risk of Article 15(c) [of the Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted] harm for the majority of those returning to that city after a significant period of time abroad. Such a risk does not arise in the case of a person connected with powerful actors or belonging to a category of middle class or professional persons, who can live to a reasonable standard in circumstances where the Article 15(c) risk, which exists for the great majority of the population, does not apply. The significance of this category should not, however, be overstated and, in particular, is not automatically to be assumed to exist, merely because a person has told lies.

... The armed conflict in Mogadishu does not, however, pose a real risk of Article 3 harm in respect of any person in that city, regardless of circumstances. The humanitarian crisis in southern and central Somalia has led to a declaration of famine in IDP camps in Mogadishu; but a returnee from the United Kingdom who is fit for work or has family connections may be able to avoid having to live in such a camp. A returnee may, nevertheless, face a real risk of Article 3 harm, by reason of his or her vulnerability.”

33. The Swedish Migration Board Country Information Service (Lifos) issued a report, “The Security Situation in Somalia”, on 24 October 2012, based on a fact finding mission to Nairobi in Kenya and to Mogadishu, Hargeysa and Boosaaso in Somalia on 6 to 19 June 2012. It stated the following:

“Lifos notices that the Transitional Federal Government (TFG) and the African Union Mission in Somalia (AMISOM) currently have influence in the whole of Mogadishu and that Al Shabaab no longer controls any part of the city. There is no heavy fighting along front lines in the city. However, Al Shabaab is still present in the city mixed with the civilians and can from that position perform attacks. The violence is mainly targeted towards specific groups in the society, but also affects the ordinary citizen being in the wrong place at the wrong time. The violence consists of different types of bombs (suicide bombs, roadside bombs, car bombs etc.), but can also be shootings between different militias or by the TFG or AMISOM when a bomb attack has been carried out. There is reason to believe that other actors than Al Shabaab are behind some of the targeted violence, e.g. as part of infighting in TFG. The security situation is changing rapidly and the situation is unpredictable. There can be four to five hand grenade attacks a day in different parts of the city and about five road side

bombs in a week. There is widespread criminality and access to weapons is not a problem among ordinary men.

Since Al Shabaab no longer controls any part of the city, there have been improvements for the ordinary man. There is no frontline in the city anymore and there have been some improvements in the infrastructure, such as electricity, which affect everyday life. However, water and sanitation still does not work. Somalis return to Mogadishu, both from other parts of Somalia and from abroad, but most of them stay a short while to make business and then return to their families outside the city or in the diaspora. Investments in land and real estate have led to a construction boom. This in turn leads to work opportunities for day labour in the city but also means that internally displaced persons (IDP), with short notice and without having a new place to go to, are driven from their homes. The widespread criminality and the fact that the police lack capacity to investigate crimes, and that corruption in the administration is widespread, leave the ordinary man in an insecure situation. Weapon related injuries are common. There were 3,000 weapon related injuries reported during February to May 2012. For the ordinary man the biggest risk is to be at the wrong place at the wrong time and be exposed to a bomb attack of some kind or a shoot out and be accused by TFG of being an Al Shabaab member or vice versa. As Al Shabaab no longer controls any part of the city and the Al Shabaab members are mixed in with the civilian population it is hard to know who is who and the suspicion is high from all sides. It does not take much for someone to become suspicious of someone else to belong to the other side, causing this person to be a target for violence. For the ordinary woman the biggest threat is to be exposed to assault and sexual violence.

There are some groups in the society who [are] particularly targeted for killings and other attacks. These are persons with influence in the society, for example wealthy businessmen, journalists, politically active, persons in or with connections to TFG, persons who sympathise with Al Shabaab, non-Somalis, persons working for or who are associated with NGO's.

A considerable part of the inhabitants in Mogadishu are internally displaced persons (IDP) and their situation is particularly difficult. They lack clan protection and are extremely vulnerable for assaults. Their poor shelters, of which the walls often can be cut up by a knife, make them vulnerable for assaults even at home. They are a source of income for gatekeepers who charge them for so called protection, but currently also face evictions when new investments in the land or the buildings where they live give the owner better profit than letting IDPs stay there.

The aspect of clans is still important in the city in the sense that the ordinary man who moves in the city must know his clan, even if nobody stops anyone just because of clan. However, clan has made a comeback as an important matter in the political context.

It is easier to move around in the city even if there [are] check points where one is required to pay to pass. The information gathered about the possibility to move around in Mogadishu is in some aspects contradictory. There does not seem to be a homogenous picture of where TFG's check points are situated or how many check points there are. Nor is there a homogenous picture of how much one has to pay or if everyone passing has to pay. Lifos draws the conclusion that it is hard to know who actually controls the check points, among other things due to the fact that there are a variety of uniforms prevailing in the city and the possibility to buy uniforms at the Bakara market. Since TFG's policemen and soldiers are paid irregularly and, as being the men controlling the illegal check points, they can be assumed to secure an income

on their own in an unpredictable way. No one of the persons Lifos spoke to has mentioned violence or assaults at the check points. “

34. The Danish Immigration Service and the Norwegian Landinfo issued in January 2013 a joint report, “Update on security and human rights issues in South-Central Somalia, including Mogadishu”, based on their fact-finding mission to Nairobi in Kenya and Mogadishu in Somalia on 17 to 28 October 2012. It stated the following (at p. 13):

“Regarding civilian casualties in Mogadishu, an international organisation explained that it is very difficult, if not impossible, to present exact figures as there is often no reporting. Many wounded never attend hospital for treatment. The international organisation also estimated that the problem of civilian casualties is one related to all armed stakeholders in the city. However, the international organisation believed that there is a decrease in the number of civilian casualties in Mogadishu, relative to the last few years. This decrease is due to front-line fighting having moved out of Mogadishu. There are now fewer mass-casualty attacks and killings, in particular due to the cessation of shelling in Mogadishu. Still civilian casualties remain a daily occurrence, principally due to assassinations, improvised explosive devices (IEDs) and suicide attacks, and reactions to these attacks by armed forces. Recent grenade and suicide bomb attacks on theatres and cafes, such as the August 2012 attack on the Jezira Hotel, cause numerous civilian casualties.

...

According to Elman Peace and Human Rights Centre, Mogadishu, the security situation in Mogadishu changes rapidly, but the situation has improved a lot since February 2012. [I]t could even be considered stable, but fragile. Security incidents can happen, but actions [by al-Shabaab] are not so much coordinated as before. Crossfire etc. has diminished, likewise suicide missions. ...

...

35. Regarding the security situation for civilians in the city, the report noted, among other things, the following (at pp. 15-23):

Regarding main challenges for ordinary people in Mogadishu Ayaki Ito, Deputy Representative, United Nations High Commissioner for Refugees – Somalia (UNHCR – Somalia), Nairobi explained that things are changing quite rapidly at the moment. The situation is improving, but the UN is concerned about the security vacuum. Security is an issue at the moment as AMISOM is presently [mid October 2012] out of Mogadishu and clan militias have expanded their influence. ...

...

According to Peter Klansoe, DRC [Danish Refugee Council], the security situation in Mogadishu is presently more complex and unpredictable as compared to the period during which al-Shabab was in control of parts of the city [i.e. before August 2011]. The areas of Mogadishu that were controlled by al-Shabab had some kind of law and order as well as security, despite the serious human rights abuses committed by al-Shabab. Today there is a security vacuum in parts of the city and this is due to the fact that it can be difficult for people to distinguish between militias, government soldiers and criminal gangs. In addition there are the notorious “gatekeepers”, i.e. militiamen controlling the Internally Displaced Person (IDP) camps.

...

An international organisation explained that the change in the pattern of violence and violations is due principally to the changing dynamic of the conflict in Mogadishu from largely conventional warfare, to asymmetric. Outside Mogadishu, indiscriminate attacks on civilians also continue to occur.

...

Tony Burns (Director of Operations of SAACID, a NGO) stated that during the past two months [September and October 2012] the security situation [in Mogadishu] has deteriorated, and you are seeing more and more clans remobilizing. In addition, there is no command and control within the SNAF [Somali National Armed Forces] or the police structures and the police are actually controlled by individuals along particular sub clan lines.

...

According to Saferworld some parts of Mogadishu like Yaqshid and Hurriwa are not easily accessible and probably as much as 1/3 of all 16 districts people are still unsafe, and many people are afraid of moving around. ...

According to an international NGO working in S/C [South-Central] Somalia ..., in general the security situation has improved in Mogadishu, there is a kind of normalisation, people are going to the beach and new restaurants have opened along the beach and it is more common to see cars moving even after dark. On the other hand – soldiers are not being paid, the police are not present to protect people and sometimes persons are being randomly arrested. Even though the capacity of Al-Shabab is reduced it is still present in the local community blending in together with the rest of the population, thus being able to carry out attacks.

An international NGO working in S/C Somalia ... explained that Mogadishu is safer than any other area of S/C Somalia and it is mainly people from the diaspora who return to Mogadishu, i.e. people who wishes to retrieve their property because land is very valuable, and business people looking for investments and opportunities. Mogadishu is relatively peaceful, there is a lot of reconstruction work going on, much aid came in last year due to the drought so that was a pull factor, [there is a] semblance of stability, work opportunities and huge optimism. ...

...

A local NGO in Mogadishu ... stated that it believes there has been a decrease in civilian casualties in Mogadishu for the past six months, but numbers need to be verified. However, it was emphasized that when there is no more any large scale fighting the number of civilian casualties naturally goes down. On the other hand, if one asked people living in for instance Daynile about the security situation, they would probably declare that it is unchanged compared to previous months or in Hurriwa where people would say Al-Shabab still is in charge, while people living in for instance Medina or near the airport would say that security has improved.

...”

36. On the issue of returns to Mogadishu, the report stated the following (at p. 67):

“According to Peter Klansoe, DRC, the number of returnees from the diaspora and from refugee camps in neighbouring countries to S/C Somalia, including Mogadishu, is not yet high. However, there are no exact figures on the number of returnees. Many Somali refugees are staying in the Dadaab Refugee Camp in Kenya. There are approximately half a million Somali refugees in Kenya, 200,000 in Ethiopia and

200,000 in Yemen. The vast majority of these refugees have not returned and they are not yet ready to give up their status as refugees. Refugees are not dying in the refugee camps abroad, but they are facing many hardships, including a very low level of services available to them. Despite these hardships they are not prepared to return to S/C Somalia.

Peter Klansoe, DRC explained that returnees to Mogadishu comprise people from the diaspora who are claiming and securing property (land, plots and houses), making investments, and many are positioning themselves politically and economically. It was emphasized that the majority of these returnees are citizens or passport holders of Middle Eastern countries (especially Dubai in the United Arab Emirates and Qatar) or from western countries, including USA, Scandinavian countries, the Netherlands, UK and Canada. The majority belong to the elite. They are mostly well off people and some are well educated as well, who are not returning on a permanent basis. There are also others – for instance Danish citizens – who wish to assist, and the UNDP Quest programme is in place hiring diaspora in order to support the public sector in Mogadishu. In addition many of the returnees are economically supporting local communities in Mogadishu as well as in other locations in S/C Somalia. However, most returns to Mogadishu are not yet on a permanent basis. Although many returnees are prepared to assist their fellow men in Mogadishu they also want safety and security. ...”

37. As to the security at Mogadishu’s international airport, one of the commentators, Kilian Kleinschmidt, stated that there had been no attacks on it (p. 71 of the report).

38. The Danish Immigration Service and the Norwegian Landinfo issued another report in May 2013, „Security and protection in Mogadishu and South-Central Somalia“, based on a fact-finding mission to Nairobi and Mogadishu from 16 April to 7 May 2013.

39. The report noted that al-Shabaab had withdrawn from Mogadishu in August 2011 but the withdrawal had only been completed by the end of May 2012. Since then there had been approximately six weeks with no fighting in the city but after that there had been armed attacks again. The United Nations Department of Security and Safety (UNDSS), Mogadishu, stated that al-Shabaab was not trying to retake Mogadishu but was using the attacks as a form of harassment and as a reminder of its presence.

40. The report referred to an international NGO in Mogadishu who stated that there had been improvements in the security situation for people in the city after al-Shabaab had left the city [in August 2011]. There was no armed struggle and no frontline in the city and people could move freely around. People had full access to all districts in the city. However, the NGO stated that there were still threats in the city. The influence of al-Shabaab was not visible but it was able to undertake attacks all over the city. It further stated that the number of assassinations had increased since October 2012 but by March 2013 it had decreased again (pp. 5-8 of the report).

41. According to the report, UNDSS stated that the usual kind of attacks committed by al-Shabaab were hit and run attacks, hand grenades and targeted killings. There were also occasional mortar and other indirect fire

attacks. UNDSS stated that there were no recent reports that al-Shabaab was killing civilians deliberately through armed attacks and “the hit and run attacks [were] only directed against government affiliates and institutions like the police and the SNAF” (p. 9). An international NGO agreed with UNDSS in that al-Shabaab did not in general deliberately target civilians and stated that “the risks involved in living in Mogadishu are basically a question of being at the wrong place at the wrong time, but being increasingly desperate al-Shabaab wants to send the message that Mogadishu is not safe” (pp. 11-12).

42. The UNDSS further stated that the number of hand grenade attacks had risen in 2012 and there were currently at least four to five such attacks per week. They were directed against SNAF soldiers, government affiliates, police officers, politicians and government institutions. There were several targeted and unknown killings per week on average in the city (pp. 12-13).

43. The UNDSS also explained that SNAF soldiers also committed crimes against civilians and there existed so-called District Commissioners who collected a “tax” which was basically protection money. It did not receive many reports of ordinary crime incidents, although it did receive some reports on crimes such as armed robberies and rapes. It also noted that it was likely that some targeted killings were criminal in nature and not terrorist (p. 14).

44. The representatives interviewed in the report appeared to agree that there had been significant improvements in the security situation in Mogadishu. According to one commentator, “[t]here is no shelling and no fighting with heavy arms any longer. Al-Shabaab does not deliberately target groups of civilians. However all security is fragile ...” (p. 19). Another commentator stated “[t]hat although the security situation in Mogadishu steadily improves there is still a lot of uncertainty. The situation is not stable and it is not just serenity and peace in Mogadishu. The overall context in Somalia is still fragile, in spite of the security improvements and progresses that have been made since August 2011” (p. 19).

45. On the issue of returns to Mogadishu and Southern and Central Somalia, the report referred to a commentator from UNHCR who stated that many people from the diaspora were returning and there was in general no discrimination on the ground of belonging to the returning diaspora. Another commentator stated that ordinary people returning to the capital cited security improvements as one of the reasons for returning. A representative of a diaspora organisation in Mogadishu stated that most returnees were resourceful people who saw opportunities in the city. The UNHCR in Somalia stated that around 14,000 Somali refugees in Kenya had crossed the border into Somalia in the period from January to March 2013, although not all of them were returning completely on a voluntary basis (p. 54).

46. The Human Rights Watch World Report 2013 - Somalia, of 31 January 2013, stated the following:

“Somalia’s long-running armed conflict continues to leave civilians dead, wounded, and displaced in large numbers. Although the Islamist armed group al-Shabaab lost ground in 2012, abandoning control of key towns such as Beletweyne, Baidoa, and the strategic port city of Kismayo, it continues to carry out attacks and targeted killings, including in the capital, Mogadishu.

Both al-Shabaab and the forces arrayed against it - a combination of Somali government security forces, troops with the African Union Mission in Somalia (AMISOM), Ethiopian government forces, and allied militias - committed abuses, including indiscriminate attacks harming civilians and arbitrary arrests and detentions. In areas under its control, al-Shabaab administered arbitrary justice and imposed harsh restrictions on basic rights. The transitional Somali government largely failed to protect the basic rights of the population in areas under its control; its forces and allied militia committed serious abuses against civilians.

In 2012, the situation in Mogadishu improved somewhat, with less open armed conflict. The mandate of the transitional government of Somalia ended on August 20 with the inauguration of a new administration with a new president, prime minister, and speaker of parliament. However, improving security remains a serious challenge for the new Somali National Government, highlighted by the increase in targeted killings of journalists and infighting between government forces and militias.”

B. Somaliland

47. The United Kingdom Border and Immigration Agency’s “Operational Guidance Note on Somalia”, dated 15 December 2011, stated the following:

“2.4.6 Somaliland and Puntland are in general relatively safe. There are however major protection concerns around IDP [internally displaced person] settlements both in Puntland and Somaliland, which include overcrowding, severe levels of malnourishment, economic exploitation of children and a lack of physical security, rapes, gang rapes and other instances of sexual and gender-based violence.

...

2.4.8 The authorities in Somaliland will only admit failed asylum seekers returning from European countries who originate from their territory or those who have close affiliations to the territory through clan membership. In the case of majority clan affiliates, this means those associated with the Isaaq in Somaliland. ...”

48. The “UNHCR Eligibility Guidelines for assessing the international Protection Needs of Asylum-Seekers from Somalia”, of 5 May 2010, stated the following regarding the internal flight or relocation alternative (IFA/IRA) (at pp. 34-35):

“Somaliland and Puntland already host tens of thousands of IDPs, by far exceeding their absorption capacity. Moreover ..., the authorities in both Somaliland and Puntland have implemented strict policies with respect to Somalis not considered to originate from these areas. In Somaliland, such persons are considered as ‘foreigners’ under the Constitution of the self-declared independent State and in Puntland, national

security concerns against persons from southern and central Somalia in the wake of the 2008 suicide bombings have led to detention and deportation back to southern and central Somalia and to Somaliland and Puntland, respectively.

Furthermore, in the absence of clan protection and support, a Somali originating from another territory in Somalia would face the general fate of IDPs, including lack of protection, limited access to education and health services, vulnerability to sexual exploitation or rape, forced labour, perpetual threat of eviction, and destruction or confiscation of assets.

...

Whether an IFA/IRA exists in Puntland or Somaliland will depend on the circumstances of the individual case, including whether the individual is a member of a majority or minority clan and whether the individual originates from the territory where IFA/IRA is being considered. The generally deplorable living conditions of displaced persons in Puntland and Somaliland, however, indicate that an IFA/IRA is generally not available for individuals from southern and central Somalia in these territories.”

49. In *AMM and others (conflict – humanitarian crisis – returnees – FGM) Somalia* CG [2011] UKUT 00445 (IAC) the United Kingdom Upper Tribunal stated the following:

“There is no evidential basis for departing from the conclusion in *NM and others [(Lone women – Ashraf) Somalia* CG [2005] UKAIT 00076], that Somaliland and Puntland in general only accept back persons who were former residents of those regions and were members of locally based clans or sub clans.”

THE LAW

I. ALLEGED VIOLATION OF ARTICLES 2 AND 3 OF THE CONVENTION

50. The applicant complained that his removal from Sweden would expose him to a real risk of being subjected to treatment in breach of Articles 2 and 3 of the Convention, which read as follows:

Article 2:

“1. Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

...”

Article 3:

“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

51. The Government contested that argument.

A. Admissibility

52. The Court notes that the complaint under Articles 2 and 3 of the Convention is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The submissions of the parties

53. The applicant reiterated the claims that he had presented in the Swedish proceedings. He stated that he had submitted documents before the Migration Court of Appeal which were intended to substantiate that he had had his last residence in Mogadishu. As the court had not granted him leave to appeal, these documents had not been reviewed by the domestic courts. He stated that he had not been able to submit these documents earlier in the proceedings as his wife, because of the difficult security situation in Mogadishu, had not been able to collect them from their home and send them to the applicant in Sweden at an earlier date.

54. The applicant maintained that the language analysis undertaken by the Swedish authorities showed that he originated from Mogadishu. In his view, it also substantiated that he had had his last residence there. He referred to a judgment of the Migration Court of Appeal, of 6 October 2009, in which the court had found that there was a situation of internal armed conflict in Mogadishu. Referring also to further sources, such as the UNHCR Eligibility Guidelines for Somalia of 5 May 2010, the applicant argued that he could not be returned to Mogadishu, where he had had his last residence, on the ground of the internal armed conflict.

55. The applicant further contested the domestic authorities' finding that there existed for the applicant a reasonable and relevant option of internal flight to Somaliland. He referred to the above-mentioned UNHCR Eligibility Guidelines, according to which Somaliland would not accept Somalis who did not originate from the area. He argued that persons who could not substantiate coming from Somaliland would be at risk of being detained and then deported to southern or central Somalia. It would therefore be in breach of the principle of non-refoulement to deport him to Somaliland.

56. In his further submissions, concerning, in particular, the present security situation in Mogadishu and whether recent changes had had an impact on the risks allegedly facing him if he was ultimately returned to Somalia, the applicant referred to country information and noted that al-Shabaab was still present in the country, that there was a lack of effective protection from the authorities and that he would not be able to rely on clan protection against the threat he was facing. He maintained that he would

therefore still be at risk of treatment contrary to Articles 2 or 3 of the Convention upon return to Somalia, despite the Swedish immigration authorities' finding that there was no longer general armed conflict in Mogadishu and southern and central Somalia.

57. The Government submitted, in their original observations, that, according to the Migration Board, the deportation order against the applicant would not be implemented to Mogadishu but to Somaliland and that it was possible to travel by airplane direct from Dubai to Hargeysa.

58. Relying on *F.H. v. Sweden* (no. 32621/06, § 90, 20 January 2009) and *NA. v. the United Kingdom* (no. 25904/07, § 115, 17 July 2008), the Government submitted that there was no general need for protection for all persons from Somalia and the assessment of the need for protection would therefore have to be made on an individual basis.

59. The Government further submitted that the Migration Board and courts had made a thorough examination of the applicant's case. He had been assisted by legal counsel, the Board had conducted five interviews with the applicant and an interpreter had been present each time. The applicant had been given the opportunity to submit written observations on the minutes from several of the interviews and his counsel had been present during at least one of them. Moreover, the Migration Court had held an oral hearing in the case. The Government stated that these procedural measures enhanced the authorities' ability to assess the applicant's submissions. In the light of that, and in the light of the expertise of these authorities on asylum law and practices, their findings should be given great weight.

60. The Government noted that the applicant had not been able to submit the travel documents he had used to travel to Sweden. He had stated that the smuggler had his passport and that he had not been able to bring any documents from Somalia as he had left in great haste. The Government noted, however, that he had submitted a work identity card from the American organisation he had worked for in Mogadishu. The card had expired in 1994. He had stated that the card had been in a bag he had brought with him to Sweden. He had also stated before the Migration Board that he had a Somali passport, issued in 1990, which he had left in Somalia. On another occasion he had submitted, again before the Board, that he had used his own passport when travelling to Nairobi in March 2009, where he had stayed before travelling on to Sweden. In the light of this, the Government found that his submissions regarding his travel to Sweden were incoherent and improbable and that these inconsistencies also strengthened the authorities' conclusion that he had failed to substantiate his identity.

61. Moreover, the Government submitted that the applicant had submitted conflicting information about the whereabouts of his family. In an interview held by the Migration Board he had stated that five children from his first marriage had been living in Hargeysa the last time he had heard from them. In a submission to the Board he had stated that one daughter

from his second marriage had been threatened and had consequently travelled north to be with relatives. In another interview held by the Board he had submitted that his daughter from his second marriage had fled to Hargeysa but he had denied having said that his children from the first marriage were living there.

62. The Government also noted that in an interview conducted by the Migration Board on 14 July 2009, the applicant had submitted that he had only once been to Ethiopia, in the late 1990s. The Government pointed out that the wife of the applicant's nephew had stated on 25 June 2008, when applying for a residence permit in Sweden, that the applicant had a house in Addis Ababa and that he had lived there. She had also stated that he had been in Addis Ababa in January 2007 and February 2008 and that he was, at the time of the interview, her neighbour in Addis Ababa. In a submission to the Migration Board dated 15 September 2009, the applicant had stated that he had been in Addis Ababa on three occasions, for 45 days in 2003 or 2004, for three months in 2007 and for two months in 2008. He had attended his nephew's wedding during the last visit. The Government submitted that these circumstances reduced the credibility of the applicant's statements in general and, in particular, about where he had been living before travelling to Sweden.

63. The Government referred to the results of the analysis of the applicant's language proficiency and of a test showing that he had very good factual knowledge of Mogadishu and acknowledged that he had at some point lived in southern Somalia and Mogadishu. However, on the ground of the inconsistencies in his submissions there were doubts as to where he had resided before arriving in Sweden in 2009.

64. The Government submitted that the applicant would be able to live in Somaliland since the guarantees required for residence there were in place. He had been trained as a teacher and had previously worked and supported himself in Somalia. There was no indication that he had any health problems or was otherwise unfit to work. He had family ties to Somaliland as, according to information submitted by him, five children from his first marriage and one daughter from his second marriage were living in Hargeysa. According to country information relied on by the Migration Court of Appeal in a judgment of 24 February 2011 (UM 10061-09, see paragraph 26 above), concerning another asylum seeker from Somalia, a Somali returnee could be admitted to Somaliland if he was considered to belong or have another connection to the area. Moreover, there was nothing to indicate that the applicant would not be safe in Somaliland.

65. The Government thus stated that it was possible for the applicant to be sent to Somaliland, be admitted and settle there and that it was reasonable to expect him to do so. Therefore, the enforcement of the

expulsion order would not entail a violation of Articles 2 and 3 of the Convention.

66. In their further observations with particular regard to the present security situation in Mogadishu and as to whether recent changes had had an impact on the risks allegedly facing the applicant if he was ultimately returned to Somalia, the Government stated, referring to the Migration Board's legal position document of 13 November 2012 (see paragraph 29 above), that the security situation in Mogadishu had improved and the situation in the city was no longer a sufficient reason for granting a residence permit. An individual assessment had to be made. The Government reiterated that the details of the applicant's submissions contradicted the information submitted by his brother in 2002 and his nephew's wife in 2008. Moreover, his story was vague, lacking in detail and the applicant had changed parts of it during the course of the proceedings. These circumstances reduced the credibility of the applicant's claim that he would be at risk of treatment contrary to Articles 2 or 3 upon return.

2. The Court's assessment

67. The Court finds that the issues under Articles 2 and 3 of the Convention are indissociable and it will therefore examine them together.

68. The Court reiterates that Contracting States have the right, as a matter of well-established international law and subject to their treaty obligations, including the Convention, to control the entry, residence and expulsion of aliens (see, for example, *Üner v. the Netherlands* [GC], no. 46410/99, § 54, ECHR 2006-XII; *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, judgment of 28 May 1985, Series A no. 94, p. 34, § 67; and *Boujlifa v. France*, judgment of 21 October 1997, *Reports* 1997-VI, p. 2264, § 42). However, the expulsion of an alien by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person in question, if deported, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country. In these circumstances, Article 3 implies the obligation not to deport the person in question to that country (see, among other authorities, *Saadi v. Italy* [GC], no. 37201/06, §§ 124-125, ECHR 2008-...).

69. The assessment of whether there are substantial grounds for believing that the applicant faces such a real risk inevitably requires that the Court assesses the conditions in the receiving country against the standards of Article 3 of the Convention (*Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99, § 67, ECHR 2005-I). These standards imply that the ill-treatment the applicant alleges he will face if returned must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this is relative, depending on all the circumstances of the case

(*Hilal v. the United Kingdom*, no. 45276/99, § 60, ECHR 2001-II). Owing to the absolute character of the right guaranteed, Article 3 of the Convention may also apply where the danger emanates from persons or groups of persons who are not public officials. However, it must be shown that the risk is real and that the authorities of the receiving State are not able to obviate the risk by providing appropriate protection (*H.L.R. v. France*, judgment of 29 April 1997, *Reports* 1997-III, § 40).

70. The assessment of the existence of a real risk must necessarily be a rigorous one (see *Chahal v. the United Kingdom*, judgment of 15 November 1996, *Reports* 1996-V, § 96; and *Saadi v. Italy*, cited above, § 128). It is in principle for the applicant to adduce evidence capable of proving that there are substantial grounds for believing that, if the measure complained of were to be implemented, he would be exposed to a real risk of being subjected to treatment contrary to Article 3 (see *N. v. Finland*, no. 38885/02, § 167, 26 July 2005). In this respect, the Court acknowledges that, owing to the special situation in which asylum seekers often find themselves, it is frequently necessary to give them the benefit of the doubt when it comes to assessing the credibility of their statements and the documents submitted in support thereof. However, when information is presented which gives strong reasons to question the veracity of an asylum seeker's submissions, the individual must provide a satisfactory explanation for the alleged discrepancies (see, among other authorities, *Collins and Akasiebie v. Sweden* (dec.), no. 23944/05, 8 March 2007; and *Hakizimana v. Sweden* (dec.), no. 37913/05, 27 March 2008).

71. If the applicant has not been extradited or deported when the Court examines the case, the material point in time must be that of the Court's consideration of the case (see *Chahal v. the United Kingdom*, § 86, cited above). It is the present conditions which are decisive and it is therefore necessary to take into account information that has come to light after the final decision was taken by the domestic authorities (see *Salah Sheekh v. the Netherlands*, no. 1948/04, § 136, 11 January 2007, and *Sufi and Elmi v. the United Kingdom*, nos. 8319/07 and 11449/07, § 215, 28 June 2011).

72. The assessment must focus on the foreseeable consequences of the removal of the applicant to the country of destination, which must be considered in the light of the general situation there, as well as his personal circumstances (*Vilvarajah and Others v. the United Kingdom*, judgment of 30 October 1991, Series A no. 215, § 108). In this connection, and where it is relevant to do so, the Court will have regard to whether there is a general situation of violence existing in the country of destination (*Sufi and Elmi*, cited above, § 216).

73. The above principles apply also in regard to Article 2 of the Convention (see, for example, *Kaboulov v. Ukraine*, no. 41015/04, § 99, 19 November 2009).

74. In cases concerning the expulsion of asylum seekers, the Court does not itself examine the actual asylum applications or verify how the States honour their obligations under the Geneva Convention relating to the status of refugees. It must be satisfied, though, that the assessment made by the authorities of the Contracting State is adequate and sufficiently supported by domestic materials as well as by materials originating from other reliable and objective sources such as, for instance, other contracting or non-contracting states, agencies of the United Nations and reputable non-governmental organisations (see *N.A. v. the United Kingdom*, no. 25904/07, § 119, 17 July 2008).

75. In regard to the situation in Somalia, the Court found in June 2011 that the violence in Mogadishu was of such a level of intensity that anyone in the city would be at real risk of treatment contrary to Article 3 of the Convention (see *Sufi and Elmi*, cited above, § 250).

76. However, the Court would adopt such an approach only in the most extreme cases 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 (see *N.A. v. the United Kingdom*, § 115 and *Sufi and Elmi*, § 218, both cited above).

77. In assessing the intensity of the conflict in Mogadishu, the Court in *Sufi and Elmi* (cited above) applied the following criteria which had been identified by the United Kingdom Asylum and Immigration Tribunal in *AM & AM* ((armed conflict: risk categories) Somalia CG [2008] UKAIT 00091): “[F]irst, whether the parties to the conflict were either employing methods and tactics of warfare which increased the risk of civilian casualties or directly targeting civilians; secondly, whether the use of such methods and/or tactics was widespread among the parties to the conflict; thirdly, whether the fighting was localised or widespread; and finally, the number of civilians killed, injured and displaced as a result of the fighting” (§ 241). The Court noted that “while these criteria [were] not to be seen as an exhaustive list to be applied in all future cases”, they formed an “appropriate yardstick by which to assess the level of violence in Mogadishu” in the context of that particular case (*ibid*).

78. In reaching its conclusion about the level of violence in Mogadishu, the Court had regard to “the indiscriminate bombardments and military offensives carried out by all parties to the conflict, the unacceptable number of civilian casualties, the substantial number of persons displaced within and from the city, and the unpredictable and widespread nature of the conflict” (*ibid* § 248).

79. The Court emphasises that a finding such as the one in *Sufi and Elmi* (cited above), is inextricably linked to the situation as it was at the time the judgment was rendered. As noted above, it is the present conditions in the country or area of destination which are decisive.

80. Turning to the circumstances of the present case, the Court first notes that the Swedish authorities do not intend to deport the applicant to Mogadishu, but to Somaliland, although it does not appear that any contacts have been made with the Somaliland authorities to establish whether the applicant would be admitted there. As stated above, according to the United Kingdom Operational Guidance Note and the judgment of the Migration Court of Appeal of 24 February 2011 (UM 10061-09), the situation in Somaliland is considered to be generally relatively safe (see paragraphs 25 and 47 above). The Court also notes that at the time the decision was taken, it was the position of the Swedish authorities that no one could be deported to Mogadishu. However, the Court is aware that the Swedish authorities have recently changed their position regarding the general security situation in Mogadishu (see paragraph 27 above).

81. The Court reiterates that Article 3 does not, as such, preclude Contracting States from placing reliance on the existence of an internal flight alternative. However, certain guarantees have to be in place. It must be possible for the person to travel to the area in question, gain admittance and settle there. Otherwise an issue may arise under Article 3, the more so if in the absence of such guarantees there is a possibility of the expellee ending up in a part of the country of origin where he or she may be subjected to ill-treatment (see, among other authorities, *Salah Sheekh v. the Netherlands*, no. 1948/04, § 141, 11 January 2007). The same considerations apply to the situation in the present case where the applicant will not be sent to the area he originates from but directly to another area within his country of origin, in this case Somaliland (see, *Salah Sheekh v. the Netherlands*, cited above).

82. With reference, in particular, to the abovementioned Operational Guidance Note, the Court notes that Somali nationals would not be able to gain admittance to Somaliland unless they were born there or had strong clan connections to the region, that is, in the case of majority clan affiliates, those connected to the Isaaq clan. Moreover, according to the UNHCR Eligibility Guidelines, without clan protection they would be under “a perpetual threat of eviction” (see paragraphs 47 and 48 above).

83. The applicant belongs to the Sheikal clan and there is nothing in the case file to suggest that he is in any way affiliated with the Isaaq clan in Somaliland. The only link the applicant appears to have with the area is that at least one of his children was living there.

84. In the Court’s view, it is not possible to draw any conclusions from the conflicting information submitted by the applicant as to which, if any, of his family members are currently residing in Somaliland. Moreover, even if the applicant does currently have family in Somaliland, the Court is not convinced that that would suffice for him to gain admittance and be able to settle there. In this respect, the Government appear to rely on the above-mentioned judgment of the Migration Court of Appeal of

24 February 2011 according to which a Somali returnee could be admitted to Somaliland if he originated from the area or had another connection to it (see paragraph 25 above). The Court notes that the said judgment concerned an asylum seeker from Somalia who had no connection at all to Somaliland and the information about what kind of connection would be necessary to gain admittance was therefore not decisive in that case. Moreover, the Migration Court of Appeal referred in general to relevant country information, without any specification. In the light of other available country information referred to above, the Court finds that a closer affiliation than that held by the applicant, such as a strong clan connection, is necessary in order for a person, who does not originate from Somaliland, to be able to gain admittance and settle there.

85. It follows that, even if the Swedish authorities were to succeed in removing the applicant to Somaliland, this does not guarantee that he would be allowed in or permitted to stay there. The Government give no information on the point. It therefore appears that there is a real risk that the applicant would have no alternative but to go to other areas of Somalia, such as Mogadishu, his city of origin.

86. Therefore, the Court is now called upon to assess whether the violence in Mogadishu is, at present, still of such a level of intensity that anyone in the city would be at real risk of treatment contrary to Article 3 of the Convention. In doing so, it will have regard to, among other things, the criteria it applied in the case of *Sufi and Elmi* (see paragraph 77 above).

87. The most recent information suggests that the security situation in Mogadishu has improved since 2011 or the beginning of 2012. Al-Shabaab withdrew from the city in August 2011 and the withdrawal was complete by the end of May 2012 (see the joint report from the Danish and Norwegian immigration services of May 2013, paragraph 39 above). Thereafter the Transitional Federal Government (TFG) and AMISOM had control of the whole of Mogadishu (see, among other authorities, Lifos' report of 24 October 2012, paragraph 33 above). TFG's mandate ended on 20 August 2012 and a new administration was inaugurated (see the Human Rights Watch World Report, paragraph 46 above). The main challenge for the new Somali National Government is improving security (*ibid*) and at least one source states that the security situation deteriorated again in the first two months of the new administration, i.e. September and October 2012 (see the joint report from the Danish and Norwegian Immigration services of January 2013, paragraph 35 above, referring to a director of operations of a local NGO).

88. The sources appear to agree that the general level of violence in the city has decreased. There is no frontline in the city anymore (see Lifos' report, paragraph 33 above and the joint reports from the Danish and Norwegian Immigration services of January 2013 and of May 2013, paragraph 34 and 40 above). Consequently, there have been improvements

for the ordinary citizens and a certain normalisation of the daily life in the city (same sources, paragraphs 33 to 35 above). However, al-Shabaab is still present in the city and does perform attacks which are mainly targeted against specific groups but can also affect the ordinary citizen. The violence in the city mainly consists of bomb attacks but can also consist of shootings between different militias, TFG or AMISOM (Lifos, paragraph 33 above).

89. Exact figures about civilian casualties do not appear to be readily available but sources indicate that the number of civilian casualties has decreased because front-line fighting has moved out of the city (see paragraph 34 above) and there is no shelling any more (see paragraph 44 above). However, civilian casualties do remain a daily occurrence (see paragraph 34 above). Sources also appear to agree that al-Shabaab does not, in general, target civilians deliberately; its attacks are directed against government affiliates, the police, SNAF and other such groups (see paragraph 41 and 42 above).

90. Moreover, the relevant country information indicates that people are returning to Mogadishu, although it is not yet clear to which extent. Reports mention that people from the diaspora are returning as are also some refugees from across the border in Kenya. The numbers do not appear to be high at the moment, seen in light of the significant number of displaced persons.

91. The Court is aware that the human rights and security situation in Mogadishu is serious and fragile and in many ways unpredictable. However, in the light of the above, in particular the fact that al-Shabaab is no longer in power in the city, there is no front-line fighting or shelling any longer and the number of civilian casualties has gone down, it finds that the available country information does not indicate that the situation is, at present, of such a nature as to place everyone who is present in the city at a real risk of treatment contrary to Article 3 of the Convention. Therefore, the Court has to establish whether the applicant's personal situation is such that his return to Somalia would contravene the relevant provisions of the Convention.

92. The Court notes that the applicant was heard by both the Migration Board and the Migration Court, that his claims were carefully examined by these instances and that they delivered decisions containing extensive reasons for their conclusions, albeit on the basis of a return to Somalia and not to Somaliland.

93. The Court agrees with the Swedish authorities that the applicant has substantiated that he originates from Mogadishu. However, as noted by the authorities, he has failed to substantiate that he lived there in the years prior to leaving the country in 2009. In that context, the Court notes, in particular, the inconsistencies in the applicant's submissions and the conflicting information submitted by his brother and his nephew's wife. The Court also notes that he has submitted conflicting information on the whereabouts of

his children. In the light of this, the Court finds that there are credibility issues concerning a number of the applicant's submissions.

94. Moreover, the Court finds, as noted by the Swedish authorities, that the applicant's submissions regarding his work for the American Friends Service Community were vague and lacking in detail. He had not been able to submit information about the nature of his work or how the Islamist courts and al-Shabaab had become aware of it. The Court also finds it surprising that al-Shabaab would start to threaten the applicant on the ground of his work four years after he stopped the work.

95. The Court further notes, as did the Swedish authorities, that the threats against the applicant allegedly took place in a period during which he has not substantiated that he in fact lived in Mogadishu.

96. Lastly, the Court notes that the applicant does not belong to any group that is at risk of being targeted by al-Shabaab and that allegedly he has a home in Mogadishu, where his wife lives.

97. Having regard to the above, the Court concludes that the applicant has failed to make it plausible that he would face a real risk of being killed or subjected to ill-treatment upon return to Somalia. Consequently, his deportation to that country would not involve a violation of Article 2 or 3 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

98. The applicant also invoked Article 8 of the Convention and complained that, since his wife was residing in Mogadishu, it would violate his rights under that provision to deport him to another part of Somalia.

99. The Court has examined this complaint as it has been submitted. In the light of all the material in its possession, and in so far as the criteria set out in Article 35 § 1 have been complied with and the matter complained of is within its competence, the Court finds that it does not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols. It follows that this complaint must be rejected in accordance with Article 35 § 4 of the Convention.

III. RULE 39 OF THE RULES OF COURT

100. The Court points out that, in accordance with Article 44 § 2 of the Convention, the present judgment will not become final until (a) the parties declare that they will not request that the case be referred to the Grand Chamber; or (b) three months after the date of the judgment, if reference of the case to the Grand Chamber has not been requested; or (c) the Panel of the Grand Chamber rejects any request to refer under Article 43 of the Convention.

101. It considers that the indication made to the Government under Rule 39 of the Rules of Court (see above § 4) must remain in force until the present judgment becomes final or until the Court takes a further decision in this connection.

FOR THESE REASONS, THE COURT

1. *Declares* unanimously the complaint concerning Articles 2 and 3 admissible and the remainder of the application inadmissible;
2. *Holds* by five votes to two that the implementation of the deportation order against the applicant would not give rise to a violation of Articles 2 and 3 of the Convention.

Done in English, and notified in writing on 5 September 2013, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Mark Villiger
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Power-Forde joined by Judge Zupančič is annexed to this judgment.

M.V.
C.W.

DISSENTING OPINION OF JUDGE POWER-FORDE
JOINED BY JUDGE ZUPANČIČ

This case marks a significant departure from the Court's relatively recent judgment of *Sufi and Elmi v. the United Kingdom*.¹ In that case, the Court reiterated its view that Mogadishu was not "a safe place safe for the vast majority of civilians" (*Sufi* § 291). The Court, in this case, has decided that the return of this applicant to Mogadishu would not violate Article 3 of the Convention. Somewhat unusually, it has come to this view without an assessment of the risk of the applicant's return to Mogadishu having been conducted at domestic level. When *his* asylum claim was decided "it was the position of the Swedish authorities that no one could be deported to Mogadishu" (§ 80) and the domestic decisions in his case were based on a proposed deportation to Somaliland. The majority disagrees with the national authorities' position on the applicant's return to Somaliland (§ 85) and conducts, *de novo*, an assessment of the risk to the applicant if he were to end up in Mogadishu, noting only that since the time when his asylum claim was examined, the Migration Board had changed its general stance on the security situation in Mogadishu.

My inability to join the majority in its finding of no violation is based upon, what I consider to be, the deficiency in its analysis and the prematurity of its conclusions regarding the general situation in Mogadishu. In finding that the level of violence in Mogadishu posed a real risk to anyone in the capital, the Court in *Sufi* had regard to four factors: (i) the general level of violence; (ii) the number of civilian casualties; (iii) the substantial number of internally displaced persons; and (iv) the unpredictable and widespread nature of the conflict (*Sufi* § 248).

Since the protection against the treatment prohibited by Article 3 is absolute and the values in issue are fundamental, the Court has repeatedly confirmed that the assessment of the existence of a risk must be a "rigorous" one.² To my mind, there is a deficiency in the majority's approach in this regard which can be seen, for example, in its failure to examine a number of important factors to which the Court had regard in *Sufi*. In departing from the Court's earlier finding, the majority has considered, briefly, only the general level of violence and the numbers of civilian casualties in Mogadishu (§§ 88, 89). It has failed to include in its assessment the reality of massive internal displacement of persons and the unpredictability of the still volatile situation in the Somali capital.

I agree with the majority that the general level of violence in Mogadishu, according to some sources, appears to have decreased somewhat in recent times. However, in assessing the risk one must factor in that al-Shabaab

¹ *Sufi and Elmi v. the United Kingdom*, nos. 8319/07 and 11449/07, 28 June 2011

² *Chahal v United Kingdom* judgment of 15 November 1996, *Reports* 1996-V, § 96

remains present in the city and continues to perform attacks, including, high profile suicide bombings that affect ordinary citizens.³ The majority also relies upon sources that indicate ‘that the number of civilian casualties has decreased’ in Mogadishu. However, those same sources (cited in § 34 of the judgment) confirm that ‘it is very difficult, if not impossible, to present exact figures as there is often no reporting’ of the number of civilian casualties. Many wounded never attend hospital for treatment and civilian casualties remain a daily occurrence. In its 2013 World Report, Human Rights Watch noted that civilians in Mogadishu continued to be killed and wounded by crossfire, particularly, during in-fighting between Transitional Federal Government (TFG) forces over control of roadblocks and by improvised explosive devices and grenade attacks primarily by al-Shabaab fighters.

In conducting its assessment of the Article 3 risk to the applicant upon his return to Mogadishu, the majority has had no regard to the substantial number of displaced persons living in the Somali capital. In *Sufi*, the Court noted that 179,000 people had been displaced in Mogadishu during the first quarter of 2010 and that a further 75,000 people had been displaced during the second quarter (*Sufi* § 245). Since then, that number has risen to 360,000 as masses of internally displaced persons (IDPs) live in makeshift tents in crowded conditions in the city.⁴ Human Rights Watch further confirms that the diversion of humanitarian aid within Mogadishu by government forces, allied militia, officials and others, and insecurity at food distribution sites have significantly limited the access that displaced persons have to assistance. It also found that the TFG forces and allied militias committed a range of abuses against internally displaced persons in Mogadishu, including rape, looting of food aid from camps and arbitrary arrests and detention.⁵

In considering the dire humanitarian conditions in Somalia, the Court in *Sufi* confirmed that the approach taken in *M.S.S. v Belgium and Greece*⁶ was the correct one. This approach requires the Court “to have regard to an applicant’s ability to cater for his most basic needs, such as food, hygiene and shelter, his vulnerability to ill-treatment and the prospect of his situation improving within a reasonable time” (*Sufi* § 283). In failing to have regard to the hundreds of thousands of displaced persons in Mogadishu and in omitting to consider the dire humanitarian conditions and abuses occurring with camps, the majority’s assessment of the Article 3 risk faced by the applicant if returned to Mogadishu is flawed.

³ Human Rights Watch, 2013 World Report, Somalia.

⁴ UN Office for the Coordination of Humanitarian Affairs, OCHA Mogadishu Head Office, 11 April 2013

⁵ Human Rights Watch, 2013 World Report, Somalia

⁶ *MSS v Belgium and Greece* [GC], no. 30696/09, 21 January, 2011

Coupled with that, the unpredictable nature of the conflict in Mogadishu receives little consideration by the majority. The volatility and instability of the situation is demonstrated in the fact that whilst al-Shabaab lost ground in 2012, targeted killings of civilians increased during the same year in areas controlled by the Somalia authorities.⁷ Human Rights Watch confirmed that government affiliated forces and allied militia committed targeted killings and summary executions in towns recently vacated by al-Shabaab and that they arbitrarily detained civilians, particularly men, during security operations. The situation in the region remains volatile and can change from day to day. In view of the objective situation of instability and violence, the UNHCR in 2013 has continued to reinforce its advocacy for protection against *refoulement*.⁸

I agree that there are signs that Somalia is emerging from a state of emergency to a state of fragile recovery. However, given the devastating human rights abuses throughout the twenty year civil war and the ongoing human rights abuses under the current regime, it is premature, to my mind, to conclude that the situation has changed so fundamentally in the two years since the Court delivered its judgment in *Sufi* that Mogadishu can now be considered as a place to which failed asylum seekers may be returned safely and without posing a real risk under Article 3 of the Convention.

In a recent visit by the United Nations High Commissioner for Refugees to Mogadishu, it was noted that a small number of Somalis have spontaneously taken the decision to move back to Mogadishu and to other areas under government control. This, it was noted, was a moment of hope for the people of Somalia. However, there is a world of a difference between a small number of people choosing, voluntarily, to assume the risks involved in returning to their war torn homes and the forcible expulsion by a Convention State of vulnerable people to a still volatile conflict zone with dire humanitarian deficiencies. In view of the objective situation in Somalia, the UNHCR continues to advocate that returns should be, first and foremost, voluntary. The Commissioner concluded that at this time “the vast majority of Somalis in exile are still in need of asylum” as conditions are not yet safe for a large-scale repatriation.⁹

I am unable to share the majority’s confidence that the situation in Somalia today is so different from the one that prevailed when the Court delivered its judgment in *Sufi and Elmi v. the United Kingdom* such as would warrant a departure from the Court’s findings in that case.

⁷ Human Rights Watch, 2013 World Report, Somalia

⁸ UNHCR 2013 Country Operations Profile, Somalia

⁹ UNHCR, 9 July 2013, Visit of UNHCR to Mogadishu