Federal Court  Cour fédérale

**Date: 20090729**

**Docket: IMM-5691-08**

**Citation: 2009 FC 781**

**Ottawa, Ontario, July 29, 2009**

**PRESENT: The Honourable Mr. Justice Russell**

**BETWEEN:**

**MOHAMED SAID JAMA**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

## REASONS FOR JUDGMENT

[1] This is an application pursuant to subsection 72 (1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act) for judicial review of a decision of the Minister's Delegate (Delegate), dated December 8, 2008 (Decision) finding that the Applicant constitutes a danger to the public of Canada under 115 (2)(*a*) of the Act.

## BACKGROUND

[2] The Applicant entered Canada at the Fort Erie Peace Bridge on June 16, 1991 and claimed refugee status. On March 11, 1992, he was determined to be a Convention refugee by the Refugee Division of the Immigration and Refugee Board (IRB). On October 2, 2002, his application for permanent residence was declared abandoned and a deportation order was issued against him on June 21, 2007.

[3] On November 5, 2007, Citizenship and Immigration Canada (CIC) officials in Winnipeg informed the Applicant of their intention to seek the opinion of the Minister that he is a danger to the public and should be removed to Somalia. The Applicant refused to acknowledge receipt of this information.

[4] The Applicant's criminal record is as follows:

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| November 15, 1995 | Burnaby, B.C. Convicted of:<br>Driving While Ability Impaired-Section 253(a) of the *Criminal Code.* He was sentenced to $300 fine, in default of 3 days imprisonment, and prohibition of driving for 1 year. |
| May 18, 2005 | Winnipeg, MB. Convicted of:<br>Possession of a Weapon-Section 88 of the *Criminal Code.* He was sentenced to 9 months and a mandatory prohibition order under section 109 of the *Criminal Code.*<br><br>Public Mischief-Section 140(1)(b) of the *Criminal Code.* He was sentenced to 8 months concurrent.<br><br>Robbery-Section 344(b) of the *Criminal Code.* He was sentenced to 6 months concurrent and a mandatory prohibition order under section 109 of the *Criminal Code* concurrent.<br><br>Failure to Comply with Recognizance (x2)-Section 145(3) of the *Criminal Code.* He was sentenced to 3 months on each count concurrent and concurrent to the other convictions. |

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| August 25, 2005 | Winnipeg, MB. Convicted of:<br>Fail to Comply with Recognizance-Section 145(3) of the *Criminal Code*. He was sentenced to 1 day (and 15 days pre-sentence custody). |
| December 4, 2006 | Winnipeg, MB. Convicted of:<br>Robbery-Section 344(b) of the *Criminal Code.* He was sentenced to 7 years (with credit for the equivalent of 27 months pre-sentence custody) and mandatory prohibition order under section 109 of the *Criminal Code* on each charge concurrent.<br><br>Aggravated Assault- Section 268(1) of the *Criminal Code.* He was sentenced to 7 years (with credit for the equivalent of 27 months pre-sentence custody) and mandatory prohibition order under section 109 of the *Criminal Code* on each charge concurrent.<br><br>Assault with a Weapon- Section 267(a) of the *Criminal Code.* He was sentenced to 7 years (with credit for the equivalent of 27 months pre-sentence custody) and mandatory prohibition order under section 109 of the *Criminal Code* on each charge concurrent. |
| April 16, 2007 | Winnipeg, MB. Convicted of:<br>Failure to Comply with Recognizance—Section 145(3) of the *Criminal Code.* He was sentenced to 30 days of time served on each charge concurrent.<br><br>Failure to Attend Court- Section 145(2)(a) of the *Criminal Code.* He was sentenced to 30 days of time served on each charge concurrent. |

[5] The Applicant appealed his December 4, 2006 sentence and the appeal was heard on June 7, 2007. He was given additional credit for 13 months (and 15 days pre-sentence custody). The Applicant also has a criminal record in the United States.

**DECISION UNDER REVIEW**

[6] The Delegate concluded that, based on the Applicant's convictions for robbery and aggravated assault, he is inadmissible on grounds of serious criminality.

[7] The Delegate noted that the determination of public danger has to be accompanied by the balancing of risk: the risk to the Applicant in Somalia against the risk he poses to Canadian society. The Applicant indicated to the Delegate in a letter that he took a "bad turn" and has "embraced the opportunity to turn his life around." He also said that "he can and will live up to his responsibilities as a member of Canadian society and be a contributing member."

**Danger Assessment and Conclusion**

[8] The Delegate cites *La v. Canada (Minister of Citizenship and Immigration)* 2003 FCT 476 (F.C.T.D.) at paragraph 17:

> **17** The proper approach to the issue before me was set out by Justice Strayer in Williams v. Canada (Minister of Citizenship and Immigration), [1997] 2 F.C. 646 (C.A.) at paragraph 29, where he outlined the meaning of "danger to the public" as expressed in the Act and the kind of analysis this phrase compelled:
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> > par. 29 It has been said by the Supreme Court in *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606... that a law is unconstitutionally vague "if it so lacks in precision as not to give sufficient guidance for legal debate". In the context of judicial review of a ministerial decision as to whether she "is of the opinion that a person constitutes a danger to the public in Canada" the question must be: does this phraseology give sufficient direction to the Minister so that both she and the Court can determine whether she is exercising the power for the purposes intended by Parliament? In my view the formulation in subsection 70(5) is sufficiently clear for that purpose. In the context the meaning of "public danger" is not a mystery: it must refer to the possibility that a person who has committed a serious

> crime in the past may seriously be thought to be a potential re-offender. It need not be proven -- indeed it cannot be proven -- that the person will reoffend. What I believe the subsection adequately focuses the Minister's mind on is consideration of whether, given what she knows about the individual and what that individual has had to say in his own behalf, she can form an opinion in good faith that he is a possible re-offender whose presence in Canada creates an unacceptable risk to the public.

[9] The Delegate found it positive that the Applicant has successfully completed many programs offered to him while incarcerated and has positive reports from his teachers. He has taken responsibility for his actions, expressed remorse and regrets his actions. However, this remorse and taking of personal responsibility have not occurred until recently.

[10] The Delegate found the April 26, 2004 assault to be particularly aggressive and indicative of the "type of senseless harm that [the Applicant's] actions have inflicted on members of the Canadian public." The Applicant and his co-aggressors preyed upon two unarmed victims who were in their apartment. When one of the victims attempted to flee the scene of the crime, the Applicant ran after him and stabbed him in the face. Although the Delegate acknowledged that the Applicant has taken steps to deal with his anger and aggression, "on balance, [the Applicant] is a potential re-offender who is capable of committing a similar violent offence again."

[11] The Delegate also concluded that the Applicant has shown himself to be a recidivist with a pattern of aggression and violence towards his victims. The Delegate noted that, although the Applicant claims to have turned his criminal behaviour around since being incarcerated and taking programs, his conduct reveals a person with a propensity to threaten and commit violent acts against

members of the community with the use of weapons. He has multiple criminal convictions, including aggravated assault, assault with a weapon and robbery and his conduct cannot be described as an isolated event where he made a mistake and then learned from his initial interaction with the criminal justice system. The Applicant has a "cumulative effect" of criminal conduct indicative of a person who has repeatedly shown disrespect for and violated Canadian laws. This supports a finding that he is likely to re-offend in the future.

[12] The Delegate also comments on the Applicant's lack of respect for Canada's judicial system. He has failed to comply with orders, failed to attend court, and has breached conditions of release on more then one occasion; all which indicate a pattern of conduct of someone who is likely to re-offend. The Delegate notes that the "threat of further punishment did not deter [the Applicant] from re-offending…A person who disregards Court imposed conditions is, on balance, a person who is likely to re-offend and is also a person who poses a danger to the safety and well-being of Canadians."

[13] In relation to the Applicant's behaviour in custody, the Delegate notes that it has been described as problematic. The Applicant has received several charges stemming from threats and abuse to staff, contravening rules during a Code Red lock down, promoting gang activity, as well as assault and attempted assault against his fellow inmates. The Applicant has not taken the blame for this conduct and has "deflected blame onto the staff of the corrections facility." The Applicant's Preliminary Assessment Report (with respect to his claim of motivation to follow his correctional

plan and to change his life), said that "motivation seems to be directed more toward 'playing the system' and 'beating the system' rather than any sincere desire to change."

[14] The Delegate concludes on this point by stating that, although the Applicant has "made strides towards positive pro-social living," on a balance of probabilities, the Applicant is likely to re-offend and shows a trend toward recidivism and against a finding that he is rehabilitated. The Delegate states that the Applicant "is a possible re-offender whose presence in Canada creates an unacceptable risk to the public and as a result I find he constitutes a danger to the Canadian public…[the Applicant] is a danger to the Canadian public now and in the future, I have considered the criminal convictions on record without considering withdrawn charges or his drug conviction from the United States."

**Risk Assessment**

[15] The Delegate points out that subsection 115(2)(*a*) of the Act creates an exception to the general protection provided to Convention refugees that they not be returned to a country where they would be at risk of persecution. This is the embodiment into Canada's domestic legislation of Article 33(2) of the U.N. Convention relating to the status of refugees. The Delegate considered all of counsel's submissions regarding country conditions in Somalia and, in particular, the personal circumstances of the Applicant. The Delegate considered, on a balance of probabilities, whether the Applicant would be personally subject to any of the grounds of risk enumerated under section 97 of the Act.

[16] The Delegate felt that the Applicant's belonging to one of the strongest remaining clans in Somalia would, on balance, ameliorate the risks he faces upon return. Although counsel submitted that there was no faction in Somalia that would be willing and able to offer the Applicant protection there, the Delegate concluded that his membership in the Darod clan would give him a connection, as well as clan protection in those areas of the country where the Marehan clan is more prevalent.

[17] The Delegate also pointed out that the Applicant has been in Canada for the past 18 years and has not been singled out, sought after or targeted as the son of a person formerly affiliated with the Said Barre regime. The Delegate found the allegation that the Applicant will face the same fate as his father and brother to be speculative and the potential risk based on this allegation did not satisfy him that it is more likely than not that the Applicant would be specifically targeted because of his father's previous affiliation with Said Barre's regime. The Delegate found it more likely that he will not be remembered and will not be of any particular interest to any of those factions currently vying for control in Somalia.

[18] The Delegate goes on to say that the Applicant's clan and sub-clan affiliation does not place him at any greater risk of harm than any other individual from Somalia, where inter-clan fighting is the norm. Although the Applicant would have difficulty reintegrating into Somalia, the Delegate was satisfied, on a balance of probabilities, that "any difficulties [the Applicant] would face in assimilating back into Somalian society, particularly in those areas where his sub-clan the Marehan reside, would not, on the evidence…subject him personally to those risk enumerated under section 97 of IRPA."

[19] The Delegate concludes that the Applicant will not personally face a risk of torture, a risk to his life, or a risk of cruel and unusual treatment or punishment based on the current country conditions in Somalia and that he may be removed to an area of the country in Somalia, other than Mogadishu, where it would be safer for members of his particular ethnic clan, the Marehan. The Delegate found that the Applicant was a danger to the public in Canada and the need to protect Canadian society outweighs any possible risk that he might face if he is returned to Somalia.

**Humanitarian and Compassionate Considerations and Best Interests of the Child**

[20] The Applicant is separated from his wife and child in Canada and, in 2006, had had no contact with them in five years. The Applicant also has four children in the United States from previous relationships. He stated in 2006 that he is in contact with the mother of three of his children. The Delegate was not aware of any regular contact of the Applicant with his foreign-born children at the present time. The Delegate commented that "the best interests of [the Applicant's] children would not be significantly impacted by his removal from Canada in light of the paucity of information relating to how his children's interests would be negatively affected, if he is removed from Canada."

[21] The Delegate noted that there were no letters of support filed by the Applicant's family members. Due to the lack of evidence to support the Applicant's apparent long-term desire to be with his wife and child from the United States, the Delegate gave very little weight to "family

reunification and establishment factors which might have warranted allowing [the Applicant] to remain in Canada on these grounds."

[22] The Delegate concluded on this issue as follows:

> … there are insufficient positive humanitarian and compassionate factors that would warrant allowing [the Applicant] to remain in Canada. Given the lack of humanitarian and compassionate factors weighing in [the Applicant's] favour when balanced against the potential danger that he poses to the Canadian public should he be allowed to remain, I find this balance tips heavily in favour of his removal.

**ISSUES**

[23] The Applicant has not presented a formal list of issues but has set out various grounds for error in his arguments. I have dealt with them roughly in the order presented by the Applicant.

**STATUTORY PROVISIONS**

[24] The following provisions of the Act are applicable in these proceedings:

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| **36.** (1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for | **36.** (1) Emportent interdiction de territoire pour grande criminalité les faits suivants : |
| (*a*) having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, or of an offence under | *a*) être déclaré coupable au Canada d'une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans ou d'une infraction à une loi fédérale |

an Act of Parliament for which a term of imprisonment of more than six months has been imposed;

pour laquelle un emprisonnement de plus de six mois est infligé;

(*b*) having been convicted of an offence outside Canada that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years; or

*b*) être déclaré coupable, à l'extérieur du Canada, d'une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans;

(*c*) committing an act outside Canada that is an offence in the place where it was committed and that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years.

*c*) commettre, à l'extérieur du Canada, une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans.

**Convention refugee**

**96.** A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

**Définition de « réfugié »**

**96.** A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :

(*a*) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or

*a*) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;

(*b*) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

*b*) soit, si elle n’a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

**Person in need of protection**

**97.** (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

**Personne à protéger**

**97.** (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n’a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :

(*a*) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

*a*) soit au risque, s’il y a des motifs sérieux de le croire, d’être soumise à la torture au sens de l’article premier de la Convention contre la torture;

(*b*) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

*b*) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(ii) elle y est exposée en tout lieu de ce pays alors que d’autres personnes originaires de ce pays ou qui s’y trouvent ne le sont généralement pas,

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| (iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and | (iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles, |
| (iv) the risk is not caused by the inability of that country to provide adequate health or medical care. | (iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats. |
| **Person in need of protection** | **Personne à protéger** |
| (2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection. | (2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection. |
| **115.** (1) A protected person or a person who is recognized as a Convention refugee by another country to which the person may be returned shall not be removed from Canada to a country where they would be at risk of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion or at risk of torture or cruel and unusual treatment or punishment. | **115.** (1) Ne peut être renvoyée dans un pays où elle risque la persécution du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques, la torture ou des traitements ou peines cruels et inusités, la personne protégée ou la personne dont il est statué que la qualité de réfugié lui a été reconnue par un autre pays vers lequel elle peut être renvoyée. |
| Exceptions | Exclusion |
| (2) Subsection (1) does not apply in the case of a person | (2) Le paragraphe (1) ne s'applique pas à l'interdit de |

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| | territoire : |
| (*a*) who is inadmissible on grounds of serious criminality and who constitutes, in the opinion of the Minister, a danger to the public in Canada; or | *a*) pour grande criminalité qui, selon le ministre, constitue un danger pour le public au Canada; |
| (*b*) who is inadmissible on grounds of security, violating human or international rights or organized criminality if, in the opinion of the Minister, the person should not be allowed to remain in Canada on the basis of the nature and severity of acts committed or of danger to the security of Canada. | *b*) pour raison de sécurité ou pour atteinte aux droits humains ou internationaux ou criminalité organisée si, selon le ministre, il ne devrait pas être présent au Canada en raison soit de la nature et de la gravité de ses actes passés, soit du danger qu'il constitue pour la sécurité du Canada. |

**STANDARD OF REVIEW**

[25] The Respondent submits that the Delegate's assessment of whether an individual constitutes a danger to the public in Canada and whether that individual may face risk on refoulment is entitled to a high degree of deference for which the applicable standard of review is reasonableness: *Nagalingam v. Canada (Minister of Citizenship and Immigration)* 2008 FCA 153 at paragraph 32 (*Nagalingam*); *Dunsmuir v. New Brunswick* 2008 SCC 9 (*Dunsmuir*) at paragraph 51; *Suresh v. Canada (Minister of Citizenship and Immigration),* [2002] 1 S.C.R. 3 at paragraphs 29 and 41. The Respondent says that questions of law are reviewable on a standard of correctness and an inconsequential error of law, which could have no effect on the outcome, does not require this Court to set aside the decision under review: *Genex Communications Inc. v. Canada (Attorney General),*

2005 FCA 283 at paragraph 42 and *Canadian Cable Television Assn. v. American College Sports Collective of Canada, Inc.*, [1991] 3 F.C. 626 (F.C.A.) at paragraph 41.

[26] *Sittampalam v. Canada (Minister of Citizenship and Immigration)* 2009 FC 65 at paragraph 13 provides as follows:

> **13** At the time of the July 2006 Opinion, the standard of review applied to assess whether the Applicant posed a danger to the public and ought to be removed from Canada because of the nature and severity of the acts committed was patent unreasonableness. *Dunsmuir*, has merged patent unreasonableness with reasonableness *simpliciter* into the reasonableness standard…

[27] In *Dunsmuir*, the Supreme Court of Canada recognized that, although the reasonableness *simpliciter* and patent unreasonableness standards are theoretically different, "the analytical problems that arise in trying to apply the different standards undercut any conceptual usefulness created by the inherently greater flexibility of having multiple standards of review": *Dunsmuir* at paragraph 44. Consequently, the Supreme Court of Canada held that the two reasonableness standards should be collapsed into a single form of "reasonableness" review.

[28] The Supreme Court of Canada in *Dunsmuir* also held that the standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to the particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[29] Thus, in light of the Supreme Court of Canada's decision in *Dunsmuir* and the previous jurisprudence of this Court, I find the standard of review applicable to the Decision generally on this application to be reasonableness. However, during the course of argument, the Applicant also raises a variety of legal issues which, as my analysis will show, I have reviewed on a standard of correctness. When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir* at paragraph 47. Put another way, the Court should only intervene if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

**ARGUMENTS**

**The Applicant**

**Risk Assessment**

**i) Categories of Risk**

[30] The Applicant submits that the danger determination required by law is not just a determination of the danger he poses to society. It is rather a balancing inquiry that weighs the risk to society if he remains in Canada against risk to him on his return to Somalia and those humanitarian considerations which argue against removal. This balancing is grafted onto the Act

through the *Canadian Charter of Rights and Freedoms*. The Applicant cites *Ragupathy v. Canada (Minister of Citizenship and Immigration)* 2006 FCA 151 at paragraphs 18 and 19:

> **18** If the delegate is of the opinion that the presence of the protected person does not present a danger to the public, that is the end of the subsection 115(2) inquiry. He or she does not fall within the exception to the prohibition in subsection 115(1) against the *refoulement* of protected persons and may not be deported. If, on the other hand, the delegate is of the opinion that the person is a danger to the public, the delegate must then assess whether, and to what extent, the person would be at risk of persecution, torture or other inhuman punishment or treatment if he was removed. At this stage, the delegate must determine how much of a danger the person's continuing presence presents, in order to balance the risk and, apparently, other humanitarian and compassionate circumstances, against the magnitude of the danger to the public if he remains.
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> **19** The risk inquiry and the subsequent balancing of danger and risk are not expressly directed by subsection 115(2), which speaks only of serious criminality and danger to the public. Rather, they have been grafted on to the danger to the public opinion, in order to enable a determination to be made as to whether a protected person's removal would so shock the conscience as to breach the person's rights under section 7 of the Charter not to be deprived of the right to life, liberty and security of the person other than in accordance with the principles of fundamental justice. See *Suresh v. Canada (Minister of Citizenship and Immigration)*, especially at paras. 76-9.

[31] The Applicant contends that the Delegate in the present case transforms the Charter risk analysis into an IRPA section 97 analysis. Yet the two are legally not the same. The Applicant also says that the Delegate has not assessed section 96 risks. The Applicant contends that it is not clear why the Delegate has done only a partial risk assessment and abandoned the persecution component which the Federal Court of Appeal has indicated is required. He says it may be the result of

confusion about the relationship between Article 33(2) of the Refugee Convention and section 115(2) of the Act.

[32] The Applicant submits that the interpretation of Article 33(2) of the Refugee Convention and Canadian law and its interpretation of section 115(2) of the Act necessitates the same conclusion. There has to be a balancing of risks to the individual against the risks to society. The Applicant cites the Office of the United Nations High Commissioner for Refugees in a publication called *Refugee Protection in International Law* edited by Erika Feller, Volker Turk and Frances Nicholson, in a chapter contributed to by Sir Elihu Lauterpacht and Daniel Bethlehem in an article titled "The Scope and Content of the Principle of Non-Refoulement: Opinion":

> (v) The requirement of proportionality
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> 177. Referring to the discussions in the drafting conference, Weis put the matter in the following terms:
> The principle of proportionality has to be observed, that is, in the words of the UK representative at the Conference, whether the danger entailed to the refugee by expulsion or return outweighs the menace to public security that would arise if he were permitted to stay.
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> 178. The requirement of proportionality will necessitate that consideration be given to factors such as:
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> (a) the seriousness of the danger posed to the security of the country;
> (b) the likelihood of that danger being realized and its imminence;
> (c) whether the danger to the security of the country would be eliminated or significantly alleviated by the removal of the individual concerned;…
> (d) the nature and seriousness of the risk to the individual from refoulement;
> (e) whether other avenues consistent with the prohibition of refoulement are available and could be followed, whether in the country of refuge or by the removal of the individual concerned to a safe third country.

> 179. It must be reiterated that a State will not be entitled to rely on the national security exception if to do so would expose the individual concerned to a danger of torture or cruel, inhuman or degrading treatment or punishment or a risk coming within the scope of other non-derogable principles of human rights. Where the exception does operate, its application must be subject to strict compliance with principles of due process of law.
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> (c) The interpretation and application of the "danger to the community" exception
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> 180. Article 33(2) provides that the prohibition of refoulement cannot be claimed by a refugee "who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country."
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> 181. Many of the elements considered above in respect of the interpretation of the national security exception will apply *mutatis mutandis* to the interpretation and application of the "danger to the community" exception. It, too, is clearly prospective in nature. While past conduct will be relevant to this assessment, the material consideration will be whether there is a danger to the community in the future.
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> 183. Other elements discussed above in respect of the national security exception that will also apply to the "danger to the community" exception include the requirement to consider individual circumstances and the requirement of proportionality and the balancing of the interests of the State and the individual concerned."

[33] The Applicant suggests that the Delegate seems to assume from Article 33(2) of the Refugee Convention that risk to society alone can obviate consideration of section 96 risks. Therefore, she has misunderstood the Refugee Convention and her Charter analysis is defective. The Applicant says that it is not the law that section 7 of the Charter equates to section 97 of the Act. The risks set out in sections 96 and 97 of the Act are both of equal relevance to an assessment of the risk of violation of section 7 of the Charter. The Applicant also says that the reasoning of the Delegate that

what may prevent the removal of the Applicant under the Charter is section 97 risks only, and not section 96 risks, is wrong in law.

**ii. Cessation**

[34] The Applicant submits that he was determined to be a Convention refugee because his father was a general of the marines in the government of former Somali dictator Said Barre. The assessment of the Delegate that the risk to the Applicant had abated with time was not within her power to make. The Applicant relies upon section 108 of the Act:

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| **108.** (1) A claim for refugee protection shall be rejected, and a person is not a Convention refugee or a person in need of protection, in any of the following circumstances: | **108.** (1) Est rejetée la demande d'asile et le demandeur n'a pas qualité de réfugié ou de personne à protéger dans tel des cas suivants : |
| (*a*) the person has voluntarily reavailed themself of the protection of their country of nationality; | *a*) il se réclame de nouveau et volontairement de la protection du pays dont il a la nationalité; |
| (*b*) the person has voluntarily reacquired their nationality; | *b*) il recouvre volontairement sa nationalité; |
| (*c*) the person has acquired a new nationality and enjoys the protection of the country of that new nationality; | *c*) il acquiert une nouvelle nationalité et jouit de la protection du pays de sa nouvelle nationalité; |
| (*d*) the person has voluntarily become re-established in the country that the person left or | *d*) il retourne volontairement s'établir dans le pays qu'il a quitté ou hors duquel il est |

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| remained outside of and in respect of which the person claimed refugee protection in Canada; or | demeuré et en raison duquel il a demandé l'asile au Canada; |
| (*e*) the reasons for which the person sought refugee protection have ceased to exist. | *e*) les raisons qui lui ont fait demander l'asile n'existent plus. |

[35] The Applicant submits that cessation can occur if there is a determination that the reasons for which the person sought refugee protection have ceased to exist. In this case, the Applicant contends that there was no such determination and that a determination was made by the IRB which cannot be made by the Delegate. The Applicant cites *Nagalingam* at paragraph 43:

> …To this end, I agree with the respondent that the *Ragupathy* approach ensures that the Delegate maintains his jurisdiction as his role is not in any way to remove or alter the subject's status as Convention refugee (respondent's memorandum at paragraph 71). Proceeding in this manner guarantees that the Delegate's function will not usurp the role of the Refugee Protection Division on a cessation determination pursuant to subsection 108(2) of the Act.

[36] The Applicant submits that the Delegate has done what the Federal Court of Appeal has said she cannot do. She has made a cessation determination when only the Refugee Protection Division of the IRB can do that. The Applicant points out that the Delegate has made a legally incorrect risk assessment and does not have a cessation jurisdiction, as the test is change of circumstances in the country of origin and not the passage of time. The Applicant cites *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689 at paragraph 48:

> …Moreover, it would seem to defeat the purpose of international protection if a claimant would be required to risk his or her life seeking ineffective protection of a state, merely to demonstrate that ineffectiveness.

**iii. Generalized Violence**

[37] On this issue, the Applicant says that the Delegate found that he did not fall within section 97 of the Act. The Applicant cites *Salibian v. Canada (Minister of Employment and Immigration)*, [1990] 3 F.C. 250 (F.C.A.) (*Salibian)* at paragraph 17:

> **17** It can be said in light of earlier decisions by this Court on claims to Convention refugee status that
>
> > (1) the applicant does not have to show that he had himself been persecuted in the past or would himself be persecuted in the future;
> > (2) the applicant can show that the fear he had resulted not from reprehensible acts committed or likely to be committed directly against him but from reprehensible acts committed or likely to be committed against members of a group to which he belonged;
> > (3) a situation of civil war in a given country is not an obstacle to a claim provided the fear felt is not that felt indiscriminately by all citizens as a consequence of the civil war, but that felt by the applicant himself, by a group with which he is associated, or, even, by all citizens on account of a risk of persecution based on one of the reasons stated in the definition; and
> > (4) the fear felt is that of a reasonable possibility that the applicant will be persecuted if he returns to his country of origin (see *Seifu v. Immigration Appeal Board*, A-277-82, Pratte J.A., judgment dated 12/1/83, F.C.A., not reported, cited in *Adjei v. Canada (Minister of Employment and Immigration*), [1989] 2 F.C. 680 (C.A.), at page 683; *Darwich v. Minister of Manpower and Immigration*, [1979] *Employment and Immigration* [1979] 1 F.C. 365 (C.A.); *Rajudeen v. Minister of Employment and Immigration* (1984), 55 N.R. 129 (C.A.), at pages 133 and 134).

[38] The Applicant alleges that the Delegate ignored some of the reasoning set out by the Court of Appeal in *Salibian* because she only considered section 97 risks and not section 96 risks. The

Delegate does not base her reasoning on the appropriate risk which the Applicant faces as a member of a clan because the Delegate takes the position that all Somalis face a risk by reason of clan membership.

[39] The Applicant again cites *Ward* at paragraph 50:

> **50** The issue that arises, then, is how, in a practical sense, a claimant makes proof of a state's inability to protect its nationals as well as the reasonable nature of the claimant's refusal actually to seek out this protection. On the facts of this case, proof on this point was unnecessary, as representatives of the state authorities conceded their inability to protect Ward. Where such an admission is not available, however, clear and convincing confirmation of a state's inability to protect must be provided. For example, a claimant might advance testimony of similarly situated individuals let down by the state [page725] protection arrangement or the claimant's testimony of past personal incidents in which state protection did not materialize. Absent some evidence, the claim should fail, as nations should be presumed capable of protecting their citizens. Security of nationals is, after all, the essence of sovereignty. Absent a situation of complete breakdown of state apparatus, such as that recognized in Lebanon in Zalzali, it should be assumed that the state is capable of protecting a claimant.

[40] The Applicant submits that the Supreme Court of Canada views the complete breakdown of state apparatus as meeting the requirements of risk, but the Delegate in this case has, contrary to law, placed the Applicant completely outside of the notion of risk.

[41] The Applicant also cites and relies upon *Osman v. Canada (Minister of Citizenship and Immigration)*, [1995] F.C.J. No. 131 at paragraph 17:

> ...The Board cannot hide behind the civil war situation and automatically find that claimants from Somalia are not refugees…

[42] The Applicant says that the failure of the Delegate to consider section 96 risks makes a real difference because the Delegate applied an exception which negates only a section 97 claim of risk. If the Delegate had considered section 96 risks, and had not applied a generalized violence exception, it is impossible to say what her conclusion would have been.

**Humanitarian Considerations**

[43] On this issue, he Applicant submits that the Delegate ignored a crucial factor: risk to the Applicant separate from the risks set out in sections 96 and 97 of the Act. The Applicant states that a person may be at risk without that risk meeting either the standard of risk set out in the Convention refugee definition or section 97 of the Act. This risk is particularly pertinent to a humanitarian determination.

[44] The Applicant states that there are a number of cases where the Court has overturned a negative humanitarian decision on the basis that the Officer assumed there was no risk simply because a PRRA application had been rejected: *Pinter v. Canada (Minister of Citizenship and Immigration)* 2005 FC 296.

[45] The Applicant also contends that it was an error in law for the Delegate to have concluded that she was not required to deal with risk factors in her assessment of the humanitarian and compassionate considerations. The Applicant says that she should not have closed her mind to risk factors even if the Applicant faces no risks which fall within section 97 of the Act.

[46] The Applicant notes that the Delegate does not make a finding that the Applicant would be safe in Somalia, but instead finds only that "any risks Mr. Jama faces are those that are faced generally by other persons who reside in Somalia." The Applicant states that those risks were relevant to an assessment of humanitarian factors, even if they did not meet the section 97 statutory requirements of risk to life or cruel and unusual punishment set out in section 97 of the Act.

[47] The Applicant concludes by stating that the "Delegate assumes that as long as the applicant does not meet the section 97 threshold, then risk is not an issue, either for the risk assessment section or for assessment of humanitarian considerations. Because this reasoning is contrary to law, it cannot stand."

**The Respondent**

**Risk Properly Assessed**

[48] The Respondent contends that the Delegate assessed the Applicant's risk of persecution thoroughly. To the extent that the delegate may have erred in not framing her risk analysis in terms of consideration of risk of persecution, such possible error is inconsequential and does not form grounds for review.

**No Cessation Determination**

[49] The Respondent argues that the Delegate conducted an assessment under subsection 115(2) of the Act and agrees that she does not have cessation jurisdiction. The Respondent acknowledges that the Delegate in this case did not find that the Applicant would no longer be at risk. The Respondent does not agree, however, that the Delegate made a cessation determination.

[50] The Delegate's determination under subsection 115(2)(*a*) of the Act does not remove or alter its subject's status as a Convention refugee and there was no determination in this case that the Applicant had ceased to be a Convention refugee. See: *Ragupathy v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 1044 (F.C.) at paragraph 2; *Sittampalam v. Canada (Minister of Citizenship and Immigration)* 2007 FC 687 at paragraph 52; *Suresh* at paragraphs 76-78; *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982 at paragraph 58 and *Fabian v. Canada (Minister of Citizenship and Immigration)* 2003 FC 1527 at paragraphs 37-39.

[51] The Respondent points out that the Supreme Court of Canada has recognized that a "reassessment" of risk may be required as part of the factors to consider in determining whether refoulement is justified. The Respondent cites *Camara v. Canada (Minister of Citizenship and Immigration)* 2006 FC 168 at paragraphs 58 and 60:

> **58** However, the fact that the applicant had been considered at risk by the Convention Refugee Determination Division Section in 1992 does not establish that he was still at risk in 2005.

> …
>
> **60** It was the applicant's responsibility to establish that he would still be in danger in his country, which he did not do before the Minister's delegate.

[52] The Respondent says that the risk that the Applicant would face if returned to Somalia could not be established by the Applicant's Convention refugee status, or on the facts upon which Convention refugee status was granted. The risk has to be assessed in the present day.

**Generalized Violence**

[53] Regarding the risk of persecution, the Delegate made her finding not on account of risk relative to the rest of the population but on account of her finding that the Applicant would not be of particular interest to his alleged persecutors. With respect to risk on account of membership of a particular clan and family, the Respondent submits that the evidence was that all of the clans were at risk of inter-clan fighting and the risk on this basis was not personalized in any way, which it must be to qualify for protection.

[54] The Respondent distinguishes *Osman* where counsel for the Minister submitted that atrocities that might be committed in the context of a war do not have a nexus to the Convention refugee definition. The statement relied on by the Applicant from *Osman* was the Court's response to this submission. Read in context, the Court was simply stating that the Minister's submission was not the law and that, whether or not they took place in a situation of civil war, the particular circumstances of a claimant had to be assessed to determine whether or not they meet the definition.

The statement from *Osman*, therefore, does not negate the fact that, for protection under section 97, the risks must not be faced generally by other individuals in or from that country.

**No Requirement to Consider Risk Twice**

[55] The Respondent states that there is not authority for the proposition submitted by the Applicant that the Minister's delegate must conduct a risk assessment and also deal with risk factors in her assessment of humanitarian and compassionate factors. The only authority cited by the Applicant is a case where the refusal of an application for permanent residence in Canada on humanitarian and compassionate grounds was judicially reviewed. While the Court did find in *Pinter* that an immigration officer making a decision could not rely on the negative results of a pre-removal risk assessment for consideration of risk factors, but had to consider them herself in the context of the humanitarian and compassionate application, the Respondent contends that *Pinter* has no bearing on a danger decision under subsection 115(2) of the Act. A consideration of humanitarian and compassionate factors in a subsection 115(2) decision is not a separate decision akin to a humanitarian and compassionate decision. Instead, the humanitarian and compassionate factors raised in the process are further considerations to be weighed along with the danger that the subject presents to the public in Canada and the risk that he might face on return to the country he flees. The Respondent cites *Nagalingam* at paragraph 44:

> …the Delegate must balance the nature and severity of the acts committed or of the danger to the security of Canada against the degree of risk, as well as against any other humanitarian and compassionate considerations…

[56] The Respondent concludes that there is no authority for the proposition urged by the Applicant because risk is considered by the decision-maker in a subsection 115(2) danger decision.

**Applicant's Reply**

[57] On reply, the Applicant submits that the Respondent does not deny that an error was made by the Delegate, only that it is inconsequential. The Applicant submits that an error of law is inconsequential if the error "could not and did not have any effect upon the outcome." For a decision tainted by error to survive judicial review, it is not sufficient to show that the error did not have an effect on the outcome. If the error could have had an effect on the outcome, even if it did not have an effect on the outcome, the error is consequential. See: *Schaaf v. Canada (Minister of Employment and Immigration)*, [1984] 2 F.C. 334 (F.C.A.) at 341; *Nawaratnam v. Canada (Minister of Citizenship and Immigration)* 2001 FCT 976; *Canada (Secretary of State) v. Dee*, [1995] F.C.J. No. 45 (F.C.T.D.) and *Romero v. Canada (Minister of Citizenship and Immigration)* 2005 FC 1423.

[58] The Applicant also comments on his father's affiliation to the Said Barre regime and the Delegate's decision that the Applicant was no longer at risk because of his lengthy absence from Somalia and how the Respondent does not address these issues.

[59] The Applicant notes the Respondent's attempt to distinguish *Osman*, but says that there is no other jurisprudence cited by the Respondent. This is noteworthy in light of the wealth of

jurisprudence to which the Respondent refers in arguing the previous point about cessation. The Applicant concludes, by contrasting the two sections, that the Respondent is not aware of any jurisprudence in support of the position taken. Nor is the Applicant. The Applicant submits that there is no Charter or refugee jurisprudence for a person to establish a claim of risk that must be greater than the risk other individuals from the country face. What matters is the absolute level of risk, not the relative level of risk. The Applicant contends that the Delegate does not answer the following question because she determined that it did not have to be answered: Does the applicant face, objectively, on a balance of probabilities, a risk to life, liberty and security of the person without regard to the principles of fundamental justice because of his clan membership?

[60] The Applicant also points out that there is a duty to consider, when making a humanitarian decision, all relevant factors cumulatively. Even if it is assumed that the Delegate was correct in her risk determination (an assumption the Applicant rejects) that does not mean that the risk ceases to be relevant to the humanitarian determination. The Applicant cites *Retnem v. Canada (Minister of Employment and Immigration)*, [1991] F.C.J. No. 428 (F.C.A.) for the principle that it is a standard legal error to consider a number of elements relevant to a claim in isolation, dismiss them one by one, and then fail to consider whether cumulatively the elements establish the claim, even if no one individual element does. The issue is not just the cumulative consideration of risk factors, but the cumulative consideration of humanitarian factors. The Applicant contends that there was no such cumulative consideration in this case.

## ANALYSIS

### Fundamental Issue

[61] There is a fundamental disagreement between the parties about whether the Decision addresses section 96 risks. The Applicant says that, for reasons that are not clear, the Officer left section 96 risks out of her analysis and only took section 97 risks into account when conducting the weighing exercise required by section 115(2) and its related jurisprudence. This error of law, the Applicant argues, has a consequential impact upon various aspects of the Decision and it is not possible to say what the result would have been if the error had not been made.

[62] The Respondent, on the other hand, maintains that the Officer did address and take into account section 96 risks in her analysis and the framing of the Decision should not undermine its substance.

[63] Obviously, then, the first thing I must do is construe the Decision to determine whether the Officer has made a legal error by leaving section 96 risks out of account when dealing with her section 115(2) analysis.

### Section 96 Risks

[64] The Applicant identified two basic risks that he faces upon return to Somalia. First of all, there is the risk of death because he is a member of a family that is associated with the former

dictator, Said Barre, and both of the Applicant's father and brother have been killed as a result of this association. Secondly, there is the risk from clan violence that appears to be widespread in Somalia. The two risks are somewhat linked because the Applicant submitted that there was no faction in Somalia willing, or able, to offer him protection in any part of Somalia.

[65] The Officer certainly indicates an understanding in the Decision that, in considering section 115(2)(*a*), both section 96 and section 97 risks come into play:

> I note that paragraph 115(2)(a) of IRPA creates an exception to the general protection provided to Convention refugees that they not be returned to the country where they would be at risk of persecution (serious possibility or reasonable chance of persecution).

[66] The Officer then goes on to quote both sections 96 and 97 of IRPA.

[67] In the Risk Assessment section of the Decision, in referring to counsel's submissions, the Officer identifies the specific risks that she has been asked to assess by the Applicant. The Officer then begins her analysis in the following way:

> As a starting point, I note that s. 115(2)(a) creates an exception to the general protection provided to Convention refugees that they not be returned to the country where they would be at risk of persecution (serious possibility or reasonable chance or (*sic*) persecution). This is the embodiment into Canada's domestic legislation of Article 33(2) of the U.N. Convention relating to the status of refugees. In undertaking this risk assessment, I have considered all of counsel's submissions regarding country conditions in Somalia and in particular the personal circumstances of Mr. Jama, relative to these conditions. The analysis I have undertaken is whether Mr. Jama would, on a balance of probabilities, be personally subject to any of the grounds of risk enumerated under s. 97 of IRPA.

[68] As a statement of what the Decision includes, this is confusing. Persecution is highlighted at the beginning of the paragraph and section 97 risk at the end. The question for the Court is whether the only analysis of risk to the Applicant in Somalia in the Decision pertains to the "grounds of risk enumerated under s. 97 of IRPA."

[69] When I read the Risk Assessment as a whole it is clear to me that, although the Officer does not formally refer to section 96 risks, she certainly addresses the actual section 96 risks raised by the Applicant and makes factual findings concerning those risks:

> Mr. Jama has stated he would face risk to his life and the same treatment as his brother and father because of his Darod clan membership and specifically his sub-clan membership as a Marehan since many of them used to work in the Said Barre regime. In view of the information in the country condition reports, it would appear that the Darod clan is still one of the leading clan groups in Somalia at the present time. According to the article above, while these clan memberships are complex and further divided into sub-clans and sub-sub clans, in my view, the very fact that Mr. Jama belongs to one of the strongest remaining clans would, on balance, ameliorate the risks he faces upon return. Although Counsel states that there is no faction in Somalia that would be willing and able to offer him protection in any part of Somalia, as a member of the Darod clan, one of the more prominent clans in Somalia, his membership in this clan gives him a clan connection as well as clan protection in those areas of the country where Marehan clan are more prevalent.
>
> In his submissions, Counsel asserts that Mr. Jama would be targeted and meet the same fate as his father and brother. As this is a very serious claim, I have given it careful consideration. Mr. Jama has been in Canada for the past 18 years, and based on my consideration of the evidence before me, I am not able to find, on a balance of probabilities, that Mr. Jama would be singled out, sought after or targeted as the son of a person formerly affiliated with the Said Barre regime. More particularly, I find the allegation that Mr. Jama will face the same fate as his father and brother is speculative and the potential risk based on this allegation does not satisfy me that it is more likely than not that he would be specifically targeted because of

> his father's previous affiliation with Said Barre's regime. Rather, I find it more likely that he will not be remembered or be of any particular interest to any of those factions currently vying for control in Somalia. I make this finding based on Mr. Jama's lengthy absence from Somalia, having left Somalia as a young man and having resided in Canada since 1991. Thus, I find on a balance of probabilities that Mr. Jama would not be of particular interest in Somalia because of his father's former status as a general associated with the former President of Somalia, Said Barre.
>
> I also appreciate the prejudice faced by the Darod clan Marehan sub-clan, particularly from members of the Hawiye clan. However, Mr. Jama's clan and sub-clan affiliation, per se, does not place him at any greater risk of harm than any other individuals from Somalia, where inter-clan fighting is the norm.

[70] It seems to me that, as findings of fact, this part of the Decision deals with all of the risks raised by the Applicant and finds that:

a. The Applicant would not be singled out and targeted because of his family associations and he will not be of particular interest in Somalia because of his father's former status as a general associated with the former President of Somalia, Said Barre; and

b. The Applicant has clan protection and his clan affiliations do not place him at any greater risk of harm than any other individuals from Somalia, where inter-clan fighting is the norm.

[71] It seems to me that these findings of fact address and reject all of the risks raised by the Applicant, whether as a refugee under section 96 or as a person in need of protection under section 97. If the Applicant would not be of particular interest in Somalia, and if he has "clan protection in

those areas of the country where Marehan clan are more prevalent," then the Applicant has no well-founded fear of persecution and he is not in need of protection from section 97 risks.

[72] It may be possible to take issue with the reasonableness of these conclusions, but I cannot say that section 96 persecution is left out of account by the Officer in her section 115(2) analysis.

[73] It is true that the Officer does tend to emphasize section 97 at various places in the Decision and does not identify specific risks put forward by the Applicant with section 96. In particular, in the section of the Decision headed "Conclusion" the Officer only deals with section 97:

> In reviewing the material to determine if Mr. Jama may face risk upon return to Somalia, I have specifically turned my mind to those risks enumerated under section 97 of IRPA. I have also borne in mind that these risks "… would be faced by the person in every part of the country and is not faced generally by other individuals in or from that country." Based on all the information I have reviewed, I am satisfied on a balance of probabilities that Mr. Jama will not face any of the risks identified under section 97 of IRPA.

[74] I believe that this passage provides the key to the Officer's thinking and approach to structuring her Decision. She is saying that she has reviewed the material "to determine if Mr. Jama may face risk upon return to Somalia … ." By this she means <u>all</u> risk. But she has also "specifically turned my mind to those risks enumerated under section 97 of IRPA." In other words, she wants to make it clear that, in addressing all risk, she has paid special attention to section 97 risks because they raise different considerations from section 96 risks. I do not read her to be saying that she has <u>only</u> considered section 97 risks. Such a reading would not make sense in light of her earlier

acknowledgments in the Decision about the purpose of section 115 and its relationship to "persecution" and the Officer's specific findings of fact on all risks put forward by the Applicant.

[75] Throughout the "Risk Assessment" section of her Decision, the Officer is concerned to identify those risks faced by the Applicant that have to be balanced against the risk that the Applicant poses to the Canadian public. As regards the Applicant's assertion that he faces death because of his family connections, the Officer goes out of her way to make it clear that she does not just find against the Applicant on a balance of probabilities:

> More particularly, I find the allegation that Mr. Jama will face the same fate as his father and brother is speculative and the potential risk based on this allegation does not satisfy me that it is more likely than not he would be specifically targeted because of his father's previous affiliation with Said Barre's regime. Rather, I find it more likely that he will not be remembered or be of any particular interest to any of those factions currently vying for control in Somalia.

[76] In other words, I think the Officer is saying that, when it comes to the Applicant's risk because of his family connections, there is nothing of significance to balance against the risk that he poses to the Canadian public. And I do not read this to be a finding that relates only to section 97 risk. The clan membership risk is the same risk: "Mr. Jama has stated he would face risk to his life and the same treatment as his brother and father because of his Darod clan membership and specifically his sub-clan membership as a Marehan since many of them used to work in the Said Barre regime."

[77] The reason why the Officer pays particular attention to section 97 risks is, in my view, because, as she makes clear in her "Conclusion," she has to consider whether the Applicant's claims

that his life is threatened necessitates a consideration under subsection 97(b)(*ii*) of whether this risk will be faced by the Applicant "in every part of the country and is not faced generally by other individuals in or from that country." Having found that the Applicant has not established "risk" with regards to his family and clan connections, the Officer then considers inter-clan fighting generally and concludes that, as regards this risk, the Applicant is not "at any greater risk of harm than any other individuals from Somalia, where inter-clan fighting is the norm."

[78] All in all, the Officer appears to be saying that the risks that the Applicant faces that must be balanced against the risks he poses to the Canadian public are not risks personal to the Applicant (his family and clan associations) but are the same risks that other people from Somalia face as a result of the inter-clan fighting that is the norm in that country.

[79] In the end, I cannot agree with the Applicant that the Officer simply left the section 96 risks out of account in her determination of what risks he faced upon return to Somalia. The risks that everyone from Somalia faces because of inter-clan fighting are not section 96 risks in a country where it appears everyone has a clan affiliation and faces the same risk. And the personalized risk claimed by the Applicant because of his family and clan connections is not established because "he will not be remembered or be of any particular interest to any of those factions currently vying for control in Somalia. This holds for both sections 96 and 97.

[80] Justice Reed was faced with a similar situation in *Isa v. Canada (Secretary of State)*, [1995] F.C.J. No. 254 and had the following to say on point:

**5** Counsel for the applicant argues that the Board was wrong to find that the applicant could return to the Gedo region. It is argued that the evidence simply does not support a conclusion that it is objectively reasonable to expect him to do so. Indeed, counsel asserts that such a conclusion contradicts the Board's initial finding that "civil war, insecurity and anarchic violence in much of the country, combined with the drought and the famine sweeping through the Horn of Africa, threaten much of the surviving Somalia population ...". It is argued that those refugees who are returning to Somalia from Kenya are doing so because of Kenyan hostility to the refugees, not because it is reasonable for them to return.

**6** I am not persuaded that the Board applied the wrong test. In the Salibian decision, as the Board in this case notes, the Federal Court of Appeal held that a situation of civil war did not preclude an individual being found to be a convention refugee. It held that if an individual's fear arose because reprehensible acts were likely to be committed against members of a group to which he belonged or against all citizens as a result of one of the reasons identified in the Convention definition of a refugee, then, the individual could be a convention refugee. The applicant in that case was an Armenian Christian from Lebanon.

**7** In *Rizkallah v. The Minister of Employment and Immigration* (A-606-90, May 6, 1992 [Please see [1992] F.C.J. No. 412]), the Federal Court of Appeal again dealt with a Lebanese Christian. The Refugee Division's decision that the applicant was not a convention refugee was upheld. The Court of Appeal stated that "to succeed, refugee claimants must establish a link between themselves and persecution for a Convention reason". That is "they must be targeted for persecution in some way, either personally or collectively". The Court went on to say that the evidence in the case before it fell short of establishing that Christians in the claimant's Lebanese village were collectively targeted in some way different from the general victims of the tragic and many-sided civil war.

**8** Many, if not most civil war situations are racially or ethnically based. If racially motivated attacks in civil war circumstances constitute a ground for convention refugee status, then, all individuals on either side of the conflict will qualify. The passages quoted by the Board from the United Nations Handbook (supra) indicates that this is not the purpose of the 1951 Convention.

> **9** The applicant's claim amounts to little more than the assertion that he is a convention refugee because he is a member of the Marehan sub-clan of the Darod tribe. The Board noted that when the applicant was asked if he faced any problem in Somalia except the fighting, he said no. The Board noted that he said that, as a Marehan, he could live in the Gedo region but there would always be a fear that the region might be attacked. The documentary evidence clearly describes brutal attacks upon the Darod but it is also clear that this arises from the inter-tribal fighting in Somalia. The documentary evidence describes one of the warlords, General "Morgan", as head of the SNF, and as a Marehan of the Darod tribe. The documentary evidence supports the Board's conclusion that in Somalia it appears that "all clans and sub-clans are both perpetrators and victims and that the claimant's clan is not differentially targeted ... from any other." (See, for example, pages 238, 239, 241[1], 243, 271, 272, 282, 285, 288, 292, 294, 298 of the Application Record.) It is clear that the degree to which any clan or sub-clan is targeted depends upon the area of the country in which the members are located. I cannot fault the Board's finding that the applicant's fear was similar to that of Somalia citizens in general and arose out of the on going civil strife in that country.

[81] I can find no reviewable error as regards this issue.

**Cessation**

[82] The Applicant also argues that, by avoiding section 96, the Officer also avoids doing a full cessation analysis and a consideration of section 108 criteria (compelling reasons).

[83] First of all, as explained above, I do not find that the Officer has avoided a section 96 analysis. The Officer makes specific findings of fact that the risks put forward by the Applicant (his personal risk because of his family and clan affiliations) are not established.

[84] As I read subsection 115(2)(*a*) of IRPA, I see no statutory or legal authority for the proposition put forward by the Applicant that section 108 criteria need to be considered. The Officer was not involved in a cessation analysis under section 115(2)(*a*) and *Ragupathy v. Canada (Minister of Citizenship and Immigration)*, 2006 FCA 151, paragraphs 18-19, makes very clear the kind of balancing inquiry and analysis that was required of the Officer in this case. In my view, this was the analysis undertaken by the Officer.

[85] The jurisprudence makes it clear that the onus is on the Applicant to establish risk and that, in so doing, the Applicant cannot simply rely upon his status as a Convention refugee, particularly when, as in this case, so much time has elapsed since that finding was made (1992). Justice Pinard had the following to say on point in *Camara*:

> **58** However, the fact that the applicant had been considered at risk by the Convention Refugee Determination Division Section in 1992 does not establish that he was still at risk in 2005.
>
> **59** In fact, there was no evidence filed with the Minister's delegate, by the Agency or by the applicant's former counsel, that would suggest that there was a serious possibility or reasonable chance that the applicant would be persecuted for one of the grounds in the Convention or that he would be subjected to a danger under section 97 of the Act if he were to return to his country. Moreover, there is nothing to suggest that the applicant had a criminal record in Guinea, that charges were brought against him in 1991 or that the Guinean authorities would punish him for the crimes he committed in Canada.
>
> **60** It was the applicant's responsibility to establish that he would still be in danger in his country, which he did not do before the Minister's delegate.

[86] Justice Snider provided further confirmation on this issue in *Hasan v. Canada (Minister of Citizenship and Immigration)* 2008 FC 1069:

> **20** I find no merit in this argument. The key flaw in the Applicant's position is that s. 115(2) does not remove the person's status as a protected person or Convention refugee. The non-refoulement principle is clearly stated in s. 115(1). The delegate's decision was made pursuant to s.115(2) of IPRA and did not remove or alter the Applicant's status as a Convention refugee (*Ragupathy*, above, at para. 2, *Sittampalam v. Canada (Minister of Citizenship and Immigration*, 2007 FC 687, 62 Imm. L.R. (3d) 271, at para. 52).
>
> **21** There is no requirement in s. 115(2) that the Minister must assess the risk to the person who has been found to be a danger. That obligation arises from the operation of s. 7 of the *Charter*, as decided by the Supreme Court of Canada in *Suresh*, above. Thus, there is no parallel between the cessation provisions of s. 108, which explicitly require the Minister to demonstrate that the reasons for which the person sought refugee protection have ceased to exist, and s. 115, where the only obligation arises as a result of the *Charter*.
>
> **22** The jurisprudence is clear that, once the Applicant is found to be a danger to the public, he must establish that he would be at risk (see, for example, *Camara v. Canada (Minister of Citizenship and Immigration)*, [2006] F.C.J. No. 221, 2006 FC 168, at paras. 58-60; *Al-Kafage v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 815, 63 Imm. L.R. (3d) 234 at para. 15, *Nagalingam Trial*, above, at para. 25). Most recently in *Nagalingam Appeal*, above, the Court confirmed, at paragraph 44, that "the Convention refugee or protected person cannot rely on his or her status to trigger the application of section 7 of the Charter".

[87] In my view, then, the cessation principles do not apply in this context. The Officer simply found that the Applicant had not established risk and that, as a result of the efflux ion of time in the full context of this case, there was no personalized risk. I can find no reviewable error in this regard.

**Risk and H&C Considerations**

[88] The Applicant argues that, in her review of H&C factors, the Officer left out of account the risk he faces in Somalia. His argument is that, even if he was unable to establish section 96 or section 97 risk, he does face some risk in Somalia and this should have been taken into account. For example, the Officer found that the Applicant faces the same risk as other people from Somalia when it comes to inter-clan fighting. The Applicant says this should have been taken into account in the balance against the risks that he poses to the public in Canada.

[89] I can find no authority that supports this position. I agree with the Applicant that if an H&C application were under consideration then such risk would be a factor. In my view, however, section 115(2)(*a*) involves a very different kind of analysis and balance.

[90] As *Ragupathy* makes clear at paragraph 18, the Officer must, first of all, determine whether an applicant is dangerous to the public. The Officer must then decide "whether, and to what extent the person would be at risk of persecution, torture or other inhumane punishment or treatment if he was removed." The Officer must then "balance the risk and, apparently, other humanitarian and compassionate circumstances, against the magnitude of the danger to the public if he remains."

[91] In other words, the purpose of section 115(2)(*a*) and the balancing exercise required by the jurisprudence is not to determine whether there are sufficient H&C considerations to exempt the Applicant from a requirement of the Act. The objective is to determine whether the risk that the

Applicant poses to the Canadian public outweighs the risks he faces if returned and "other humanitarian and compassionate circumstances." The risk to the Applicant is addressed separately in the weighing process and "other humanitarian and compassionate factors" cannot, in my view, mean anything other than humanitarian and compassionate factors "other" than risk.

[92] I can find no reviewable error on this point.

**Conclusions**

[93] I can find no reviewable errors on the points raised by the Applicant and conclude that this application should be dismissed.

[94] Counsel are requested to serve and file any submissions with respect to certification of a question of general importance within seven days of receipt of these Reasons for Judgment. Each party will have a further period of three days to serve and file any reply to the submission of the opposite party Following that, a Judgment will be issued.

"James Russell"
Judge

**FEDERAL COURT**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

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| **COURT FILE NO.:** | IMM-5691-08 |
| **STYLE OF CAUSE:** | ***MOHAMED SAID JAMA***<br>***v.***<br>***THE MINISTER OF CITIZENSHIP AND IMMIGRATION*** |
| **PLACE OF HEARING:** | WINNIPEG |
| **DATE OF HEARING:** | July 14, 2009 |
| **REASONS FOR JUDGMENT:** | RUSSELL J. |
| **DATED:** | July 29, 2009 |

**WRITTEN REPRESENTATIONS BY:**

| | |
|---|---|
| David Matas | FOR THE APPLICANT |
| Nalini Reddy | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

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