

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION**

Farah IBRAHIM, Ibrahim MUSA, Khalid
Abdallah MOHMED, Ismail JIMCALE
ABDULLAH, Abdiwali Ahmed SIYAD,
Ismael Abdirashed MOHAMED, and
Khadar Abdi IBRAHIM on behalf of
themselves and all those similarly situated,

Case No.:

Plaintiffs/Petitioners,

CLASS ACTION

v.

Juan ACOSTA, Assistant Field
Officer Director, Miami Field Office,
Immigration and Customs Enforcement;
David HARDIN, Sheriff of Glades
County; Marc J. MOORE, Field Office
Director, Miami Field Office, Immigration
Customs Enforcement; Thomas HOMAN,
Acting Director, Immigration and Customs
Enforcement; Kirstjen NIELSEN,
Secretary of Homeland Security.

Defendants/Respondents.

**MOTION FOR TEMPORARY RESTRAINING ORDER
AND/OR STAY OF REMOVAL AND
REQUEST FOR EMERGENCY HEARING**

1. Pursuant to Fed. R. Civ. P. 65, Plaintiffs/Petitioners seek a Temporary Restraining Order and/or stay of removal that bars their removal until an appropriate process has determined whether, in light of current conditions and circumstances, they are entitled to mandatory protection from removal.

REQUEST FOR EMERGENCY HEARING

2. Undersigned counsel requests that the Court set this motion for a hearing as soon as possible in light of their imminent deportation.

2. Plaintiffs/Petitioners and the class they represent face imminent removal to Somalia. Undersigned counsel understands that Defendants/Respondents may put Plaintiffs/Petitioners on another plane as soon as *Wednesday, December 20, 2017* if not sooner.

3. Undersigned counsel Rebecca Sharpless, at 3:05 pm on December 18, 2017, spoke with Alicia Welch, Assistant U.S. Attorney for the Southern District, and counsel for Defendants/Respondents to ask Defendants/Respondents' position on this motion and to ascertain the date of the next flight to Somalia. Undersigned counsel has not yet heard back from Defendants/Respondents but will update the Court as communications occur.

5. Plaintiffs/Petitioners, and the class they represent, are noncitizens facing deportation to Somalia. Many have lived in the United States for years and have U.S. citizen families. All fear return to Somalia. While they all have removal orders to Somalia, these orders do not reflect critical changed circumstances that have resulted from ICE's abuses of Plaintiffs/Petitioners on December 7 flight, as well as the severe escalation of anti-West terrorist violence in Somalia in recent weeks.

6. Immigration law forbids the return of anyone who will likely be persecuted or tortured and permits reopening of removal orders based on changed circumstances. Plaintiffs/Petitioners seek a temporary restraining order or stays of removal for themselves and similarly situated people request a temporary restraining order that prohibits Defendants from deporting Plaintiffs and the class they represent until: 1) they are afforded a full and fair opportunity to seeking reopening of their removal cases; 2) they have received adequate treatment for their injuries sustained on the December 7 flight; and 3) Defendants/Respondents have taken precautions to ensure that Plaintiffs and the class they represent will not be again abused during the

deportation process, including but not limited to assurances that none of the same ICE or contract agents that were on the December 7 flight will be on the next flight.

WHEREFORE, for the reasons set forth herein and in the accompanying memorandum of law, Plaintiffs/Petitioners respectfully request this Court to grant the Temporary Restraining Order/Stay of Removal, and set the case for further briefing.

Respectfully submitted,

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Secretary of Homeland Security.

Defendants/Respondents.

**MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR
TEMPORARY RESTRAINING ORDER AND/OR STAY OF REMOVAL**

STATEMENT OF ISSUES PRESENTED

1. Whether the Court should issue an emergency order to preserve the status quo and prevent the imminent removal of Plaintiffs/Petitioners to Somalia, where they face grave danger of persecution and torture.

Plaintiffs/Petitioners' Answer: Yes.

2. Whether Plaintiffs/Petitioners are likely to prevail on their claims that their immediate removal would be unlawful under immigration law and the Due Process

Clause because they have not had a meaningful opportunity to be heard on the issue of current country conditions, including those created by Defendants/Respondents during an attempted December 7, 2017 deportation flight to Somalia.

Plaintiffs/Petitioners' Answer: Yes.

FACTS

Plaintiffs/Petitioners and the class they represent are 92 people subjected by ICE to inhumane conditions and egregious abuse during a failed attempt to deport them to Somalia on December 7, 2017. For almost two days, the men and women sat bound and shackled in an ICE-chartered airplane. The plane departed Louisiana bound for Somalia, but only made it as far as Dakar, Senegal. The plane sat on a runway at the Dakar airport for 23 hours. All of the people with removal orders on the December 7 plane are black and the vast majority are Muslim.

On the runway in Senegal, the 92 detainees were bound, their handcuffs secured to their waists, and their feet shackled together. ICE agents then engaged in extraordinary abuse of Plaintiffs/Petitioners and the others on the plane. ICE and contract workers immobilized people's with full-body restraints. *See* Plaintiffs/Petitioners' Declaration, Attached to Motion for Temporary Restraining Order. ICE agents kicked, struck, or dragged some detainees down the aisle of the plane, bound them up in straightjackets, and subjected them verbal abuse and threats. *Id.*

ICE ultimately aborted the trip and flew back to the United States, landing in Miami. In the early morning of Saturday, December 9th, ICE transported the still-shackled detainees to two detention centers in the South Florida area.

The story of the 92 detainees has garnered press coverage in international news

outlets from the New York Times to the BBC. This, in turn, triggered widespread reporting and speculation about the U.S. deportees in the Somali media. *See* Declaration of Abdinasir M. Abdulahi, Attached to Motion for Temporary Restraining Order (listing numerous links to media coverage).

The extraordinary public attention that ICE's misconduct has drawn to the 92 detainees matters because it is a unique circumstance that puts them in danger of being targeted by the anti-American, anti-Western terrorist organization, Al Shabaab. Al Shabaab is an ally of Al Qaeda and is waging a war against Somalia's fragile government.

Al Shabaab perceives people who are returning to Somalia after periods living in western nations as enemies of their cause who must be summarily executed. *See* Declaration of BBC Journalist Mary Harper, Attached to Motion for Temporary Restraining Order. Al Shabaab's violent attacks on Somali civilians whom it deems enemies are helping create what the United States has declared to be "one of the worst humanitarian crises in the world." 82 FR 4907 (renewing Temporary Protected Status to certain Somalis in the United States based on the severe level of danger).

ICE's abusive and attention-drawing actions on the December 7 flight occurred just weeks after Al Shabaab's massive bomb attack in Mogadishu on October 14, 2017. This terrorist attack killed over 500 people and was a transformative event widely referred to as "Somalia's 9/11." *See* Declaration of BBC Journalist Mary Harper, Attached to Motion for Temporary Restraining Order. The October 14th attack prompted the United States to launch bombing raids against Al Shabaab inside Somalia in November. The dramatic escalation of Al Shabaab's terrorist violence coupled with the

U.S. military's retaliation are additional new circumstances that enhance the risks created by media coverage about ICE detainees.

Plaintiffs/Petitioners face imminent removal to Somalia, where they will likely be killed or harmed due to changed circumstances in Somalia created by the media coverage and notoriety of the aborted and abusive December 7 flight. They face removal before they have a chance to seek relief from removal to the risks that the failed deportation attempt have in part created.

Plaintiffs/Petitioners and the class face imminent removal without assurances that, this time, the Defendants/Respondents will be treated humanely and not abused during the flight and without having received adequate medical treatment for injuries sustained on the last flight.

A. Abuse on the December 7 Flight That Has Led to Media Coverage

On the December 7 flight, ICE and U.S. government contract workers forced Plaintiffs/Petitioners to stay seated and chained at their wrists, ankles, and waists for the entire flight. They denied Plaintiffs/Petitioners and the class movement to stretch and relieve swollen and numb legs and arms. The flight lasted over 40 hours, including 23 hours while the plane was on the ground in Dakar, Senegal.

When the flight was in Dakar for 23 hours, ICE officers and contract guards beat, kicked, choked, pushed, straightjacketed, threatened to kill, and berated people on the plane. ICE and contract guards also denied Plaintiffs/Petitioners and the others bathroom use, forcing people to try to urinate in bottles or on themselves.

Plaintiffs/Petitioners and class members sustained severe and ongoing injuries as a result of the abuse by ICE officers and contract guards. By restraining

Plaintiffs/Petitioners, abusing them, and creating a hostile environment of coercion and intimidation, ICE and U.S. government contract workers terrified Plaintiffs/Petitioners, and the others on the plane, and forced them to go without sleep for the duration of the flight.

B. ICE's False Public Statements About the December 7 Flight

Further stoking media coverage surrounding the December 7 flight, ICE has publicly stated that there were no issues of concern on the flight. After people on the flight spoke to the U.S. news media about their mistreatment, ICE issued the following statement regarding the flight:

Upon landing for a refueling and pilot exchange at Dakar, Senegal, ICE was notified that the relief crew was unable to get sufficient crew rest due to issues with their hotel in Dakar. The aircraft, including the detainees and crew on board, remained parked at the airport to allow the relief crew time to rest. During this time, the aircraft maintained power and air conditioning, and was stocked with sufficient food and water. Detainees were fed at regular intervals to include the providing of extra snacks and drinks. Lavatories were functional and serviced the entire duration of the trip. The allegations of ICE mistreatment onboard the Somali flight are categorically false. No one was injured during the flight, and there were no incidents or altercations that would have caused any injuries on the flight.

In its official statement, Defendants/Respondents falsely claim that there were “no incidents or altercations” or injuries and that the bathrooms “were functional and serviced the entire duration of the trip.”

In fact, there were numerous “incidents” and “altercations” and “injuries” on the trip. ICE and the contract guards injured people on their heads, arms, legs, and eyes. *See* Declarations of Plaintiffs/Petitioners, Attached to Motion for Temporary Restraining Order. Many of those injured are still injured and have not yet received adequate medical treatment. *Id.*

Plaintiffs/Petitioners and class members also did not have access to bathrooms during the trip because ICE officers and contract guards denied them access as punishment and because the toilet tanks became full of human waste and the bathrooms could not be used.

ICE does not deny that Plaintiffs/Petitioners and the others on the plane were chained at their wrists, waists, and legs and forced to stay in their seats on the plane for the duration of the flight, including the 23 hours when the flight was on the ground at Dakar.

REQUESTED RELIEF

Plaintiffs/Petitioners and the class they represent ask this Court to issue an order preventing their removal to Somalia until 1) they are afforded a full and fair opportunity to seek reopening of their removal cases; 2) they have received adequate treatment for injuries sustained on the December 7 flight; and 3) Defendants/Respondents have taken adequate measures to ensure that they will not be abused on the next flight, including but not limited to the guarantee that none of the ICE and contract officers on the December 7 flight will be on any new flight[CBL5] .

Plaintiffs/Petitioners and the class further request that the Court issue an order 1) forbidding Defendants/Respondents from transferring Plaintiffs/Respondents and the class out of Krome Service Processing Center in Miami, Florida or Glades Detention Center in Moore Haven, Florida; and 2) ordering Defendants/Respondents to return to Krome or Glades anyone who has already been transferred.

Plaintiffs/Petitioners further request that, to the extent that the Court believes

there to be contested factual or legal issues going to jurisdiction and authority to enter relief, it enter a temporary stay of removal for further briefing on these questions.

ARGUMENT

Motions for temporary restraining orders are governed by a four-factor test, the same test as for preliminary injunctions. Courts consider whether petitioners have shown: (1) a likelihood of success on the merits, (2) that they are likely to suffer irreparable harm in the absence of such relief, (3) that the balance of equities tips in their favor, and (4) that an injunction is in the public interest. *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 20 (2008). The probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury the movants will suffer absent the stay.

I. PLAINTIFFS/PETITIONERS ARE LIKELY TO SUCCEED ON THEIR CLAIMS THAT THEIR IMMEDIATE REMOVAL WOULD BE UNLAWFUL

Plaintiffs/Petitioners are likely to succeed on their claims that their immediate removal would be unlawful. U.S. law forbids the removal of individuals to countries where they would face a likelihood of persecution or torture. *See* 8 U.S.C. 1158, 1231(b)(3); 8 C.F.R. 1208.13, 1208.16. Plaintiffs/Petitioners are entitled to file a motion to reopen their removal proceedings, and to receive a decision on that motion, because they seek “[t]o apply or reapply for asylum or withholding of deportation based on changed circumstances arising in the country of nationality or in the country to which deportation has been ordered.” 8 CFR 1003.2(c)(3)(ii). Plaintiffs/Petitioners are also entitled to file a motion to reopen and to receive a decision on that motion with respect to their new claims of protection under the Convention Against Torture.

In light of recent escalating violence against Westernized Somalis returned from the United States, the Board of Immigration Appeals (BIA) has reopened final removal orders. In the unpublished decision dated December 5, 2017, *In re A-A-S-*, the BIA granted reopening to a man who was detained by ICE and was scheduled to be removed on the December 7 flight to Somalia. *See BIA In re A-A-S- Decision, Attached to Motion for Temporary Restraining Order.*

Plaintiffs/Petitioners have an even more compelling claim to changed circumstances than the applicant in *In re A-A-S-* because of the notoriety of the December 7 flight. ICE's egregious misconduct before and during the flight has generated extraordinary attention in the international media, and the attention has only become more intense because ICE continues to cover up the truth by releasing a statement about the flight that contains false statements. The story has been followed closely within Somalia. *See Declaration of Abdinasir M. Abdullah, Attached to Motion for Temporary Restraining Order.*

Because of the attention ICE itself has brought upon Plaintiffs/Petitioners inside Somalia, together with very recent escalations of Al Shabaab violence, Plaintiffs/Petitioners, and the class they represent, now face a unique and elevated risk of being persecuted, tortured or killed in Somalia, including by the fundamentalist group Al Shabaab. These new circumstances wrought by the December 7 flight and the recent escalation in Al Shabaab violence constitute critical changed facts, entitling Plaintiffs/Petitioners and the class to additional process to challenge their removal orders.

A. Plaintiffs/Petitioners Are Likely to Succeed On Their Claim That They Are Protected From Removal By the INA's Mandatory Restrictions on Removal.

Plaintiffs/Petitioners are likely to succeed on their argument that they are protected from removal by the immigration statute's mandatory restrictions on removal. U.S. law forbids removal of foreign nationals into circumstances that pose a probability of persecution or torture by government authorities or with the acquiescence of a government actor. The immigration statute provides three separate grounds for immigration relief for the Plaintiffs/Petitioners and the class they represent. The first is asylum. Foreign nationals in the United States may qualify for asylum if they can establish that they have "a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion" 8 U.S.C. § 1101(a)(42) (definition of refugee); 8 U.S.C. § 1158(b)(1)(A) (asylum eligibility).

While asylum is discretionary, the other two sources of relief related to dangerous home-country conditions are mandatory: 1) withholding of removal; and 2) relief under the Convention Against Torture (CAT). The withholding of removal statute, 8 U.S.C. § 1231(b)(3), entitled "Restriction on Removal to a country where alien's life or freedom would be threatened," prohibits removing noncitizens to a country where their life or freedom would be threatened on the grounds of race, religion, nationality, membership in a particular social group or political opinion. It contains limited exceptions for individuals who assisted in persecution, pose a danger to national security, have committed a serious nonpolitical crime outside the United States, or have been convicted of a "particularly serious crime that renders them a danger to the community." Apart from these exceptions, any individual who can demonstrate that it is more likely than not that he or she will be persecuted on one of

the five protected grounds is statutorily entitled to protection.

The Convention Against Torture protects noncitizens from removal to countries where they would face torture. *See* U.N. Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, art. 1, ¶ 1, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85. Under the CAT, an individual may not be removed if “it is more likely than not that [the individual] would be tortured if removed to the proposed country of removal.” 8 C.F.R. § 208.16(c)(2). Torture may be “inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.” 8 C.F.R. § 208.18(a)(1). Government acquiescence does not require actual knowledge or willful acceptance of torture; awareness and willful blindness will suffice. *Zheng v. Ashcroft*, 332 F.3d 1186, 1194–95 (9th Cir. 2003); *Amir Gonzales*, 467 F.3d 921, 927 (6th Cir. 2006) (“We join the Ninth and Second Circuits in holding that *In Re S-V* directly conflicts with Congress’s clear intent to include ‘willful blindness’ in the definition of ‘acquiescence.’”). The regulations implementing CAT provide for both withholding of removal and deferral of removal. Whereas withholding of removal is subject to the same exceptions as apply to § 1231(b)(3), deferral of removal contains no exceptions even for people with “particularly serious crimes.” 8 C.F.R. § 1208.17.

The legal prohibitions on removal are mandatory for anyone who satisfies the eligibility criteria set forth in the statute and regulations just cited. Importantly for this case, where country conditions change after an individual has been ordered removed, the immigration statute specifically allows motions to reopen a removal order in order to renew claims for protection in light of new facts. *See* 8 U.S.C. §

1229a(c)(7)(C)(ii); 8 C.F.R. § 1003.2(c)(3)(ii) (exempting from the deadlines and limitations on motions to reopen, those motions that are based on fear-based claims resulting from changed country conditions).

B. Plaintiffs/Petitioners Are Likely to Succeed On Their Claim that Constitutional Due Process Prevents Them From Being Removed Without Further Process.

Plaintiffs/Petitioners are likely to succeed on their claim that constitutional due process prevents them from being removed without further process. The Due Process clause guarantees fair procedures prior to deprivations of liberty or property—including removal. *See Reno v. Flores*, 507 U.S. 292, 306 (1993) (“It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings.”). Due process requires an opportunity to be heard “at a meaningful time and in a meaningful manner.” *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). Plaintiffs/Petitioners have each had a past opportunity to be heard on their removal. But Defendants/Respondents’ recent actions, and evident plan to speedily remove the Defendants/Respondents, are undercutting entirely their’ opportunity to be heard at a meaningful time—now—about current conditions, including conditions created by Defendants/Respondents themselves. Removing the Plaintiffs/Petitioners without giving them this opportunity violates the Fifth Amendment’s Due Process Clause.

Plaintiffs/Petitioners’ prior hearings did not afford them the process that is due, because country conditions in Somalia have substantially worsened in the very recent past and the December 7 flight has made Plaintiffs/Petitioners an even more heightened target for anti-West terrorist violence. The extraordinary danger Plaintiffs/Petitioners

face now therefore presents a new set of facts that entitle them to a fair process for resolution.

Due process requires that the Plaintiffs/Petitioners have a chance to demonstrate that substantive immigration law forbids their current removal. This right requires that Defendants/Respondents not be permitted to move Plaintiffs/Petitioners away from undersigned counsel. Even when time is not of the essence, both ICE's due process obligations and its policy abridge the government's discretion to transfer detainees, if transfer interferes with detainees' access to counsel. *See Louis v. Meissner*, 530 F. Supp. 924, 927 (S.D. Fla. 1981) (finding the INS had thwarted detainees' statutory and regulatory rights to representation in their removal proceedings by transferring them to remote areas lacking in counsel and interpreters); *Orantes-Hernandez v. Thornburgh*, 919 F.2d 549 (9th Cir. 1990) (holding the district court did not abuse its discretion by enjoining INS from transferring detainees irrespective of established attorney-client relationships); ICE Policy 11022.1, Detainee Transfers (Jan. 4, 2012), <https://www.ice.gov/doclib/detention-reform/pdf/hd-detainee-transfers.pdf>. Moving Plaintiffs/Petitioners away from counsel that will assist them violates Plaintiffs/Petitioners' meaningful opportunity to be heard, prior to their removal, on the issue of current country conditions.

What due process requires is that Plaintiffs/Petitioners get a meaningful chance to demonstrate that substantive immigration law forbids their current removal. This could happen in one of two ways. This Court could itself hear the Plaintiffs/Petitioners' claims under the INA/CAT. Alternatively, Plaintiff/Petitioners could be ensured time to confer with individual immigration counsel and then file a motion to reopen. Either way, this

Temporary Restraining Order or stay of removal is essential to “preserve the status quo so that a reasoned resolution of a dispute may be had,” *Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 226 (6th Cir. 1996). Resolving the issues—whether in this Court or by way of motions to reopen—will require substantial time—certainly more than the one day left before Wednesday, December 20, 2017, the date some Plaintiffs/Petitioners have been informed is intended for their removal.

Respondents will likely argue that the motion to reopen process is sufficient to meet the demands of due process, as Plaintiffs/Petitioners can have the motions heard even after they are sent to Somalia or alternatively seek administrative stays from the immigration courts or the Board of Immigration Appeals. But as two district courts have held, due process demands more than the mere availability of such relief. *See Hamama v. Adducci*, 261 F. Supp. 3d 846 (E.D. Mich. 2017) (issuing preliminary injunction staying removal to allow individuals time to prepare and file motions to reopen based on changed country conditions); *Devitri v. Cronen*, No. CV 17-11842-PBS, 2017 WL 5707528, at *4 (D. Mass. Nov. 27, 2017) (same).

The “process Congress erected can only adjudicate claims that are actually before them”, *Hamama*, 261 F.3d 846 at *13, and to even file a motion to reopen, particularly under the present conditions – where individuals are detained, many recovering from the events of last week, and counsel is still seeking access and time to develop the individual facts – necessarily require more time than the government will afford. To even request a stay from the immigration system will require the preparation of a full motion to reopen, with petitioner declarations, evidence of country conditions, and expert declarations. [Cite Realmuto Declaration]; *Hamama*, 261 F.3d at *13 (describing

difficulties of preparing and filing motion to reopen]. And even then, the stay process is not reliable. [Id.].

Moreover, the ability to litigate a motion to reopen *after* individuals have been sent to the locations where they face persecution, torture or death is an empty procedural promise.

[The] ability to further litigate these motions will almost assuredly be extinguished upon their removal Those who are tortured or killed will obviously not be able to argue their motions; even those who are able to evade this treatment will likely be focused on their safety, rather than devoting the requisite attention to their legal proceeding.

Hamama v. Adducci, 261 F. Supp. 3d 846 at *13 (E.D. Mich. 2017).

Due process therefore requires that individuals in Plaintiffs / Petitioner position be given the time necessary to seek relief in the immigration system *before* they are removed.

II. PLAINTIFFS/PETITIONERS WILL SUFFER IRREPARABLE HARM ABSENT EMERGENCY RELIEF

A. Harm to the Plaintiff/Petitioners Is Highly Likely, Grievous, and Irreparable.

The harm from Plaintiffs'/Petitioners' removal is imminent and evident. Plaintiffs/Petitioners all face significant risk of persecution and likely death at the hands of the terrorist group, Al Shabaab, if they are returned to Somalia. Ironically, it is ICE's own botched deportation that landed the Plaintiffs/Petitioners on a tarmac in Senegal for 24 hours that has greatly increased the danger for these people.

First, many of the Plaintiffs/Petitioners have already been targeted and threatened by Al Shebaab before they fled Somalia and the actions of the United States, through its agents, has exacerbated the danger. *See, e.g.*, Declaration of Plaintiff Ismail Jimcale

Abdullah, Attached to Motion for Temporary Restraining Order. The extraordinary public attention that ICE's misconduct has drawn to the 92 detainees has placed them in grave danger of being targeted by the anti-American, anti-Western terrorist organization, Al Shebaab. Al Shebaab is an ally of Al Qaeda and is waging a war against Somalia's fragile government. Al Shebaab perceives Somalis who are returning to the country after periods living in Western nations as enemies of their cause who must be summarily executed. *See* Declaration of BBC Journalist Mary Hunter, Attached to Motion for Temporary Restraining Order. Al Shebaab's violent attacks on Somali civilians that it deems enemies are helping create what the United States has declared to be "one of the worst humanitarian crises in the world." 82 FR 4907 (renewing Temporary Protected Status to certain Somalis in the United States based on the severe level of danger).

Placing this situation in the current context, ICE's abusive and attention-drawing actions on the December 7 flight occurred just weeks after Al Shebaab's massive bomb attack in Mogadishu on October 14, 2017. This terrorist attack killed over 500 people and was a transformative event widely referred to as "Somalia's 9/11." The October 14th attack prompted the United States to launch bombing raids against Al Shebaab inside Somalia in November. The dramatic escalation of Al Shebaab's terrorist violence coupled with the U.S. military's retaliation enhance the risks created by media coverage about ICE detainees. In light of recent escalating violence against Westernized Somalis returned from the United States, the Board of Immigration Appeals (BIA) has reopened final removal orders. An unpublished BIA decision dated December 5, 2017, *In re A-A-S-*, granted reopening to a man who was detained by ICE and was scheduled to be

removed on the December 7th flight to Somalia that is the subject of this litigation. *See* BIA Decision *In re A-A-S*, Attached to Motion for Temporary Restraining Order.

B. Classwide Emergency Relief Is Necessary.

ICE arrested over 92 Somalis from around the U.S. Since their return to the U.S. they have been detained at two detentions centers, one in Miami and one in Glades County, Florida. Communication with immigration detainees has been limited by both the exigent time frame and the geographical challenges. In addition, Counsel for the Plaintiffs/Petitioners have been advised that some of the members of the putative class have been held in solitary confinement. In the week since this matter came to the attention of counsel, despite herculean efforts, it has been difficult to get firm detailed information on each and every one of these detainees. Immigration law is complex, and each detainee has a different immigration and personal history. Variation in those histories will mean there is variation in what precise *immigration* relief is appropriate. But each and every one of them faces grave danger in Somalis, due to changed circumstances, and each and everyone is entitled to a meaningful chance to raise those claims and have them heard. For each one, imminent removal to Somalia would eliminate that opportunity. Accordingly, class wide emergency relief is appropriate and necessary.

III. THE BALANCE OF HARMS AND PUBLIC INTEREST WEIGH HEAVILY IN FAVOR OF EMERGENCY RELIEF.

The balance of harms and public interest weigh strongly in favor of granting emergency relief to these Plaintiffs/Petitioners. In contrast to the irreparable injury—persecution and potentially death—facing Plaintiffs/Petitioners, little harm will accrue to the government from a brief pause while Plaintiffs/Petitioners pursue available avenues of relief. Many of the Plaintiffs/Petitioners have families – parents, spouses and children in the U.S. Many have been living peaceably for years, complying with ICE instructions under Order of Supervision.

The balance of equities is substantially more favorable to Plaintiffs/Petitioners even than in the typical stay application for an ordinary immigration case: if Plaintiffs/Petitioners are removed, they will not only be unable to make out the factual record they need and unable to consult with their attorneys, they face grievous and irreparable bodily harm.

Finally, the public interest also strongly favors a stay, because the public benefits from a fair immigration system, which means an immigration system that does not send people to their potential death without giving them a chance to explain the danger they face and why it entitles them to immigration relief.

IV. THIS COURT HAS JURISDICTION OVER PLAINTIFFS/PETITIONERS/CLAIMS

A. As Two District Courts Have Held, the Suspension Clause Provides Jurisdiction To Hear Petitioners' Claims and Issue The Requested Relief.

This Court has jurisdiction to stay removal for a brief period so that Plaintiffs/Petitioners may file motions to reopen, thereby ensuring that they receive a meaningful hearing on their claims that they face persecution, torture or even death if

returned to Somalia. Under similar circumstances, the Eastern District of Michigan found jurisdiction to issue a stay of removal to allow Iraqi nationals facing sudden and imminent removal time to file and litigate motions to reopen. *See Hamama v. Adducci*, 258 F. Supp. 3d 828, 842 (E.D. Mich. 2017) (“casting these Plaintiffs/Petitioners out of this court without a stay—in the extraordinary context of this case—would ignore the reality that the process for judicial review provided for in the Real ID Act would not be adequate or effective in protecting their habeas rights. The destructive impact would critically compromise their ability to file and prosecute motions to reopen—a legal right that the Supreme Court has characterized as “an ‘important safeguard’ intended ‘to ensure a proper and lawful disposition’ of immigration proceedings.” . . . The Constitution prohibits that outcome”) (internal citations removed); *Hamama v. Adducci*, 261 F. Supp. 3d 846 (E.D. Mich. 2017) (reaffirming that the “Court is not stripped of jurisdictional grants” to hear case and enter injunction staying removal of Iraqi petitioners). Similarly, the District of Massachusetts found jurisdiction to enter stays of removal for Indonesians seeking to challenge old final orders of removal based on changed country conditions. *Devitri v. Cronen*, No. CV 17-11842-PBS, 2017 WL 5707528, at *5 (D. Mass. Nov. 27, 2017) (“this Court concludes that it has subject-matter jurisdiction under both 28 U.S.C. § 2241 and 28 U.S.C. § 1331 to ensure that there are adequate and effective alternatives to habeas corpus relief in the circumstances of this case. If the jurisdictional bar in 8 U.S.C. § 1252(g) prevented the Court from giving Petitioners an opportunity to raise their claims through fair and effective administrative procedures, the statute would violate the Suspension Clause as applied.”)

B. The Court has Inherent Authority To Enter A Stay To Allow For Time to Reach the Jurisdictional Questions.

Moreover, if the Court has any doubts about its jurisdiction, it should order full jurisdictional briefing, to allow additional time to assess its jurisdiction. It is well settled that courts always have jurisdiction to determine their own jurisdiction, and have the authority to grant stays to preserve the status quo while they determine whether they have jurisdiction. *United States v. United Mine Workers of Am.*, 330 U.S. 258, 290 (1947) (“[T]he District Court unquestionably had the power to issue a restraining order for the purpose of preserving existing conditions pending a decision upon its own jurisdiction.”); *Fernandez-Roque v. Smith*, 671 F.2d 426, 431 (11th Cir. 1982) (“A district court possesses inherent powers of equity sufficient to enable it to preserve the status quo until the question of its jurisdiction can be resolved.”).

Indeed, in at least four recent cases, district courts have issued TROs to allow them more time to determine whether they have jurisdiction to order stays of removal so that petitioners could file motions to reopen, the precise situation here. Order Continuing Preliminary-Injunction Hearing and Staying Removal of Petitioner Pending Court’s Determination of its Jurisdiction, *Sied v. Duke*, No. 17-CV-06785, Dkt. No. 26 (N.D. Cal. Dec. 11, 2017) (“Given the complexity of the [jurisdictional] issues, the court requests the benefit of sequential briefing . . . [and] finds it necessary to issue a stay of removal to maintain the status quo until it can determine whether it has jurisdiction”); *Devitri*, 2017 WL 5707528, at *1 (noting that the district court temporarily stayed removal to determine if the Court has jurisdiction before ultimately concluding it had subject matter jurisdiction); *Chhoeun v. Marin*, 8:17-cv-01898, Dkt. 32 at * 3(C.D.Cal. December 14, 2017); *Hamama v. Adducci*, No. 17-CV-11910, 2017

WL 2684477, at *3 (E.D. Mich. June 22, 2017) (granting TRO and staying removal in light of complex legal issues and governments' rush to remove petitioners, and allowing further briefing on jurisdiction issues).

Respectfully submitted,

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Law students Mary Georgevich, Alexis Dutt, and Timothy Sanders from the University of Minnesota Law School contributed to this pleading.

SWORN STATEMENT

I declare, under penalty of perjury, the following:

1. My name is Farah Ali Ibrahim. I was born on December 15, 1987, in Kismaayo, Somalia. I am currently detained at Krome in Miami. I am an asylum seeker.
2. On December 7, 2017, I was on a deportation flight from Louisiana to Somalia. We never made it to Somalia. The whole trip was very bad.
3. I was handcuffed for a total of about 48 hours, from before we left Louisiana until after we returned to Miami.
4. Before reaching Somalia, our plane made a stop in Dakar, Senegal. We waited for many hours on the plane, still handcuffed. We were told that the plane had mechanical problems and that we had to wait for a part from the United States.
5. After about 20 hours, I stood up and asked what was going on and why we were still waiting. An officer grabbed me by the collar and I fell to the floor. Officers began dragging me down the aisle and beating me.
6. The officers kicked me in the back and stepped on my hand. They kicked me in the head. One pushed his thumb hard into my neck below my ear and next to my jaw. I fell unconscious for a few minutes.
7. After that, I was put in an additional, very severe restraint. I could not sit up all the way or stand up. An officer told me that if I talked again, I would not be allowed out of the restraint until I got back to the U.S.
8. I am still in pain in my back, on my head, and in my hand. I have a lump on my forehead and I cannot bend my finger all the way. At first, I could not sleep on the side where I was kicked and the officer pushed his thumb into my neck.

Farah Ali Ibrahim
Farah Ali Ibrahim

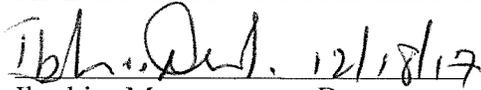
12/17/17
Date

Sworn Declaration of Ibrahim Musa

I, Ibrahim Musa, state under penalty of perjury the following.

1. My name is Ibrahim Musa. I was born in Somalia on June 14, 1969. I have lived in the U.S. for 20 years and have four U.S. citizen children. My wife is a permanent resident and eligible to naturalize. I am currently at Krome in Miami. I was picked up by ICE even though I was reporting on an order of supervision. I missed my daughter's graduation from high school earlier this year because I was detained.
2. I am an asylum seeker and I also qualified for temporary protected status. But lawyer turned in my TPS application late. I fear returning to Somalia. I am a Westernized Somali. I am afraid of Al Shabab, because they kill and harm people from the West, and I have been living in the U.S. for 20 years. I speak with an American accent.
3. I was on a deportation flight from Louisiana to Somalia, but we never arrived in Somalia. What happened on the flight was abusive and frightening. While we were stopped in Senegal, ICE told me that there was a problem with the plane and that we had to wait for a part to arrive.
4. We were never allowed off the plane while we waited. Then we learned that we were going back to the U.S. I was in the front of the plane, which was big, and could not see what was happening behind me. I could hear yelling and officers getting physical with people behind me
5. While we were on the plane, Senegalese police came on the plane twice.
6. We were shackled the entire time, from when we left from Louisiana until we arrived back in Miami, about 48 hours later. Our hands were cuffed and attached to our waist by a chain. Our legs were cuffed. My shoulders began hurting because I could not move them, and my leg was numb when I tried to stand up.
7. I am afraid that Al Shabab knows about the attempted flight that I was on and is waiting and ready to harm me, as someone who has been Americanized, when I arrive in Somalia. I have no doubt that the news of the flight, given what happened, has reached the general public in Somalia. I now fear return more than ever.

I SWEAR UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE.


Ibrahim Musa Date

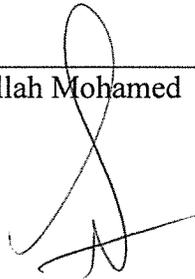
Sworn Declaration of Khalid Abdallah Mohamed

I, Khalid Abdallah Mohamed, state under penalty of perjury the following.

1. My name is Khalid Abdallah Mohamed. I was born in Oman on December 17, 1986 to Somalian parents. I only have Somalian citizenship. I immediately sought asylum when I came to the United States, and I passed a credible fear interview. I am still afraid if I have to go back to Somalia. I am afraid I might die.
2. I was on the deportation flight from Louisiana that did not make it to Somalia after stopping in Senegal. I am now detained at Krome in Miami, Florida.
3. What happened on the flight was very bad. Our plane landed in Dakar, Senegal and stayed there for about 20 hours. We were handcuffed for the whole time, for about 48 hours total. We had cuffs on our wrists, attached to our stomachs, and on our legs. I did not sleep for two days. When we finally got back to Miami, my hands, wrists, and ankles were swollen from being handcuffed for so long.
4. While we were on the ground in Senegal, officers started using violence against some of us. I saw SRT attack a man named Farah, who did not do anything to deserve it. They wrapped him up like a sandwich in extra restraints so he could not move. They made an example of him, and they told us that if we didn't stay seated, they would roll us in the restraint, too.

I SWEAR UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE.

Khalid Abdallah Mohamed Date



12/17/2017

Sworn Declaration of Ismail Jimcale Abdullah

I, Ismail Jimcale Abdullah, state under penalty of perjury the following.

1. My name is Ismail Jimcale Abdullah. I was born in Somalia on March 10, 1989. I am married, and my wife currently lives in Texas with our one year-old child. My wife and I came to the U.S. to seek asylum. I am still afraid if I have to go back to Somalia. I am afraid I might die.
2. I was on the deportation flight from Louisiana that did not make it to Somalia. I am now detained at Krome in Miami, Florida.
3. On our way to Somalia, our plane landed in Dakar, Senegal, and we stayed there for a long time, maybe over a day. We were handcuffed the whole time and our feet were shackled with our hands connected to a chain around our waist.
4. I don't know how I can be deported back to Somalia because I have no travel documents. I even asked an ICE agent on the flight to see what documents they had and they said they had none.
5. I had a pounding headache while on the plane. I tried to ask for medicine but was denied. The shackles were also very painful. Many others and I asked for pain medication but we were told there was none.
6. ICE mistreated the Somalis on a plane on Thursday last week. After hours on the plane when we were parked in Senegal, many men stood up to ask questions. Many demanded to speak with Senegalese authorities, the media, or the U.S. Embassy. We said, "We are humans."
7. I saw ICE officers forcibly push people down back into their seats and to the ground. Some people were stomped on. ICE also yelled other threats like, "If you don't sit down, I'm going to kill you." I saw ICE move some guys to the front of the plane. The guards placed them in masks and covered their bodies in order to chain them to their seats. Many people were injured on the plane.
8. Before I left Somalia in December 2015, Al Shabaab attacked my family and me. Al Shabaab believed that my family and I were helping their enemy, so they threatened to kill us if we did not stop. Al Shabaab also called and threatened my family over the phone and then killed my ~~father~~. After this happened, my wife and I fled. I have no family left in Somalia and I believed I would be killed if I have to return.
father-in-law IJA
9. My wife is in Texas now applying for asylum after we arrived at the border in 2016. My son was born there too. He is a U.S. citizen and I have not been able to see him for over a year because I have lived out my time in the U.S. in detention. I am not a criminal. All I wanted to do was seek asylum in the United States.

10. Even worse now is that Al Shabaab will come after me for being part of this flight and having lived in the U.S. Al Shabaab kills people like me who they think are Americans. The whole world knows about what happened to our plane now and now Al Shabaab will know too and this makes it much more dangerous for all of us.

I SWEAR UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE
AND CORRECT TO THE BEST OF MY KNOWLEDGE.



Ismail Jimcale Abdullah

12/17/17

Date

SWORN DECLARATION OF ABDIWALI AHMED SIYAD

I, Abdiwali Ahmed Siyad, state the following under penalty of perjury:

1. My name is Abdiwali Ahmed Siyad. I was born on October 15, 1984 in Somalia. I left in 1990 when I was a child. At the age of 4 in Somalia, I was struck by a bullet and lost an eye. I was also stabbed in the leg by terrorists.
2. I was on a deportation flight last week from Louisiana. The plane was in Senegal for almost a day. We were told that the plane was broken.
3. I was chained at my wrists, waist, and legs. The guards chained us hours before we even boarded the plane.
4. The entire flight lasted two days, including the time we were in Senegal. The chains were too tight and the guards refused to have them looser. An ICE guard stepped on my shackles and palmed my face and shoved me down twice. The guards also refused to let me pray or use the bathroom. I only used the bathroom once in front of guards during 48 hours. I got sick and vomited in the bathroom even.
5. I have a mental illness. I am on anti-depression medicine. While on the plane I asked for my medication but was denied.
6. I saw ICE guards push, punch and face palm other people on the flight. I heard people screaming and saying "get off my shackles!" ICE officers threatened people.
7. I saw people getting rolled up like a burrito in restraints.
8. I cannot go back to Somalia now. Al Shabaab is extremely dangerous to me because their people live in the houses my family used to own and they stole our property. Now they will know for sure about my American ties if I return because I have been living in the United States for so many years and they will come after me because of this.
9. The danger from Al Shabbab is way worse now because I was on this airplane and it has all been in the news. Because of the press and reporting about this plane incident, I am very very afraid Al Shabaab will know about me and will murder me if I return.

I SWEAR UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE.

Abdiwali Ahmed Siyad
Abdiwali Ahmed Siyad

12/17/17
Date

SWORN DECLARATION OF ISMAEL ABDIRASHED MOHAMED

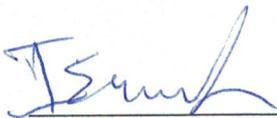
I, Ismael Abdirashed Mohamed, state the following under penalty of perjury:

1. My name is Ismael Abdirashed Mohamed. I was born on January 3, 1992 in Somalia.
2. I was on a deportation flight last week from Louisiana. On the morning of the flight, I was chained up tight at my wrists, waist, and feet hours before the plane took off.
3. The plane landed in Senegal, and we were grounded for almost a day. We were told that the plane needed to be repaired, and that the parts would take 15 hours to arrive.
4. I saw ICE guards hit several people, and I saw ICE slam into two people with their bodies while we were grounded in Senegal. I saw ICE men punch and pick up and throw a man to the floor of the plane and put their feet on his shackles. I saw ICE men surround someone else who was put in a body blanket and beaten.
5. I saw two to four people rolled up in the restraint blankets like burritos to stop from moving.
6. I asked to go to the bathroom, and the ICE guard stepped on my shackles and poked me in the eye. My eye is damaged now. Because an ICE officer shoved his finger in my eye, my vision is extremely blurry and I still cannot see out of my eye. I have received eye drops but my vision has improved little, if at all. Medical staff at Glades told me my eye might be infected. I am scared I will not be able to see out of my eye again normally in my life because of what this ICE officer did to me.
7. ICE guards told us, "We'll beat the shit out of you," if you speak up.
8. For a lot of the time on the plane, we were not allowed to use the bathroom. I had to hold my urine in for so many hours because I was afraid of being assaulted by ICE officials. Because I held my urine for so long, I began experiencing pain in my bladder. My bladder still is painful.

9. We were shackled for the entire time we were on the plane, which caused swelling at the locations of the shackles.

10. I am in fear of returning to Somalia because of Al-Shabaab now. My family members were murdered in the past in Somalia and there is not protection. I fear that Al-Shabaab will target me because of this incident with the plane, which has been widely reported in the news and they will want to kill people who have lived in the United States and they think are Americans. I fear returning and being easily identified as American and anti-Al-Shabaab, which will put place my life in great danger. There are bombings ongoing in Somalia at all times from Al-Shabaab, and murders. I think I will be murdered if I return.

I SWEAR UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE.



Ismael Abdirashed Mohamed

12/17/17

Date

SWORN DECLARATION OF KHADAR ABDI IBRAHIM

I, Khadar Abdi Ibrahim, declare the following under penalty of perjury:

1. My name is Khadar Abdi Ibrahim, born on March 10, 1987 in Somalia. I am detained by immigration at Glades detention center in Florida.
2. I left Somalia in 1989 when I was a small child. I am very afraid to go back to Somalia because I can be murdered by al Shabaab. I have tattoos all over my body and I will be recognized as a someone who lived in America because of this. Al Shabaab will target me if I return; there is no way for me to avoid it. I'm also afraid because now I hear everyone in Somali knows about the plane because its been all over the news. This makes me more afraid that Al Shabaab will know about us and target us and try to kill us in Somalia.
3. I also can explain the abuse that I and others suffered on the plane we were on last week when ICE tried to deport us to Somalia.
4. We were all shackled in very tight cuffs on our hands, waists, and legs. Our hands were connected to our waists so that we could not move them very much.
5. The flight lasted an extremely long time because the plane was grounded in Senegal for almost 24 hours. The flight then returned to the United States. The entire experience lasted two days. We were all shackled for the entire two days. The guards did not remove the shackles. We were never permitted to leave the plane to stretch or walk. I was not able to sleep at all.
6. While we were in Senegal trapped on the plane, some of the guards were abusive to some of us. When I stood up to use the bathroom, a guard picked me up by my waist and slammed me face down on a seat with my legs in the air. My neck was injured and still hurts.
7. I saw another man choked and another one punched. I saw a man bleeding from his lips. The guards wrapped a man up in a restraint that immobilized him.

I SWEAR UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE.

Khadar Ibrahim 12-17-2017
KHADAR ABDI IBRAHIM Date

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA**

Farah IBRAHIM, Ibrahim MUSA, Khalid Abdallah MOHMED, Ismail JIMCALE ABDULLAH, Abdiwali Ahmed SIYAD, Ismael Abdirashed MOHAMED, and Khadar Abdi IBRAHIM on behalf of themselves and all those similarly situated,

Plaintiffs/Petitioners,

v.

Juan ACOSTA, Assistant Field Officer Director, Miami Field Office, Immigration and Customs Enforcement; David HARDIN, Sheriff of Glades County; Marc J. MOORE, Field Office Director, Miami Field Office, Immigration and Customs Enforcement; Thomas HOMAN, Acting Director, Immigration and Customs Enforcement; Kirstjen NIELSEN, Secretary of Homeland Security.

Defendants/Respondents.

Case No.:

CLASS ACTION

DECLARATION OF MARY HARPER

Qualifications and Experience

1. I am a journalist, author and research consultant with 26 years of experience of reporting, researching and writing about Somalia and other parts of Africa. I have an MA in Social Anthropology from Cambridge University and an MA in African Studies from the School of Oriental and African Studies. I am Africa Editor for BBC News, covering the continent for BBC radio, television, online and social media. I am also the BBC's Somalia Analyst as I have a special interest in the country and have been reporting on events there since 1991. As a BBC journalist, in all my work, whether or not it is for the BBC, I adhere strictly to the BBC guidelines of objectivity, impartiality, accuracy and fairness. Indeed the condition of my doing work outside the BBC is that I always adhere to these guidelines and do not do, write or say anything that would bring into disrepute the BBC and its reputation for impartiality.
2. I have visited Somalia many times, from 1994 until the present. My last trip to the country was in May 2017. My book, *Getting Somalia Wrong? Faith, War and Hope in a Shattered State* (Zed Books) has received favourable reviews in prominent

academic journals and elsewhere.¹ I am currently writing a book to be published by Hurst² about the East African Islamist group, Al Shabaab, which is affiliated with Al Qaeda (with some splinter groups declaring allegiance to Islamic State). I have recently contributed a chapter on Al Shabaab's communication methods for a book on Somalia, also to be published by Hurst. I am a fellow of The Rift Valley Institute, which specialises in the Horn of Africa and East Africa, and the Mogadishu-based Heritage Institute of Policy Studies which focuses on Somali issues. I am a member of the Expert Advisory Panel for the European Union's Trust Fund for the Horn of Africa and the Advisory Committee of the European Commission's Foresight for EU migration and asylum policy project. I am also a Trustee and Board member of a number of other organisations connected with Africa and Somalia.

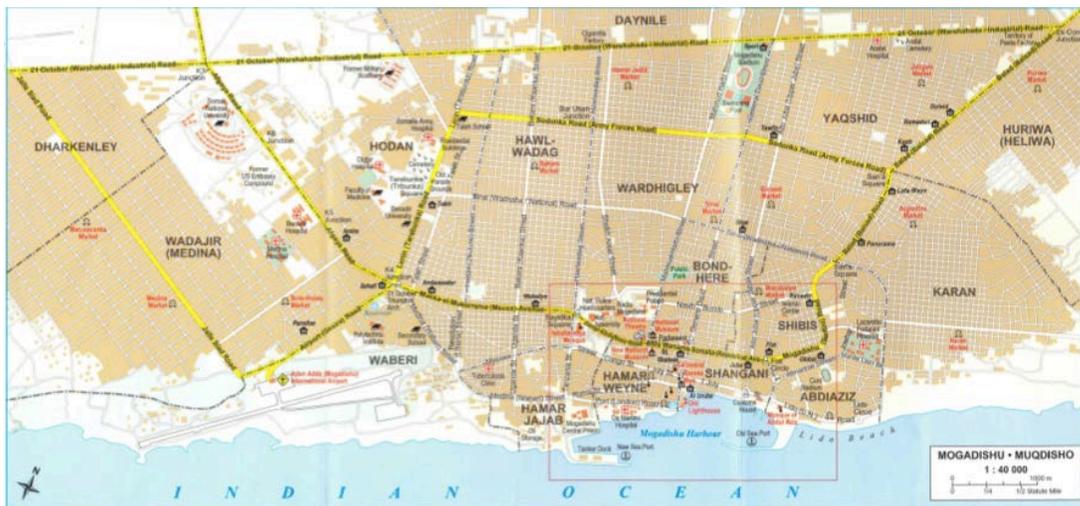
3. I give lectures, briefings and advice on Somalia to think-tanks, NATO, the EU, the British military, EUNAVFOR (the European Union's anti-piracy naval force), private security companies, counter-terrorist groups, universities and other academic institutions, British Members of Parliament, the British Foreign and Commonwealth Office and other government departments, the United Nations and humanitarian organisations. I have conducted research on Somali-related issues for the United Nations, the United States Agency for International Development (USAID), Small Arms Survey, Infoasaid, The Heritage Institute for Policy Studies and other clients. I write about Somalia for academic journals, newspapers, magazines and other publications, and have contributed chapters to forthcoming books on Somalia and Somaliland. Further details of my work can be found in my CV (appended to this report) and on my website: www.maryharper.co.uk.
4. For the purpose of conducting up to date research, I spend several weeks a year in Somalia, including areas in and around Mogadishu, and the self-declared republic of Somaliland. I also spend time in the Somali regions of Ethiopia, Djibouti and Kenya, and with Somali diaspora communities in the EU, the US, the Gulf, Turkey and elsewhere in the world.
5. Some of the comments in this statement are based on information I collected during my latest visit to Mogadishu and other parts of South Central Somalia, including Baidoa, in April 2017, as well other recent trips. During these visits, I went to several parts of Mogadishu, from north to south, east to west. I went, with heavy security, to areas considered still to harbour significant elements of the Islamist group, Al Shabaab, and where most residents of Mogadishu fear to go; they included the

¹ For reviews of my book please see:

<http://www.maryharper.co.uk/pages/reviews.html>. My work has been cited in academic articles and books about Somalia – see for example *City of Thorns* by Ben Rawlence (Portobello 2016), *The World's Most Dangerous Place* by James Fergusson (Transworld 2013), *The Mayor of Mogadishu* by Andrew Harding (Hurst 2016) and a report by the NGO Saferworld, 'Barbed wire on our heads': *Lessons from counter-terror, stabilisation and statebuilding in Somalia*.

² <http://www.hurstpublishers.com>

districts of Huriwa, Yaqshid and Daynile (see Map 1 below). In 2013 and 2014 I travelled by road, with heavy security, about 15 kilometres south of Mogadishu towards Merca. I have spoken to many people, including the Somali president Mohamed Abdullahi Mohamed Farmajo, government ministers and other members of the administration; regional presidents, ministers and other officials; foreign diplomats and United Nations officials, journalists and health workers; members of the Somali security and intelligence services, the African Union force (AMISOM), British and other international military stationed in Somalia, foreign intelligence officials working in Somalia, members of private security companies (international and Somali); international, regional and local non-governmental organisations (NGOs), civil society groups, think tanks, health workers, the business community and other groups. In several instances, I speak to these people on condition of anonymity. Many put themselves at considerable personal risk by talking to me, as they would face possible reprisals from Al Shabaab by sharing information with a Westerner, and/ or punishment from their employers. I have made it clear in the footnotes of this report when the person I spoke to asked for their name and the name of their organisation to be withheld.



Map 1 – Mogadishu

6. My most recent visits to Mogadishu were not under BBC auspices. A number of recent planned BBC trips have been postponed for security reasons. I visit Somalia in a personal capacity because I feel that in order to authoritatively report, comment and offer analysis on Somalia, I have to be up to date with the situation on the ground. I spent most of the first five months on 2017 in Somalia and Somali-speaking regions in the Horn of Africa researching my second book, which is about Al Shabaab.
7. Although I put myself at considerable personal risk by being there, I have a sense of responsibility as a journalist, author, expert witness and research consultant on Somalia to bear witness to conditions in Mogadishu and elsewhere in the country. With the help of trusted Somalis, I do what I can to mitigate that risk. I travel around Mogadishu in a two-vehicle convoy, which includes at least six well-armed

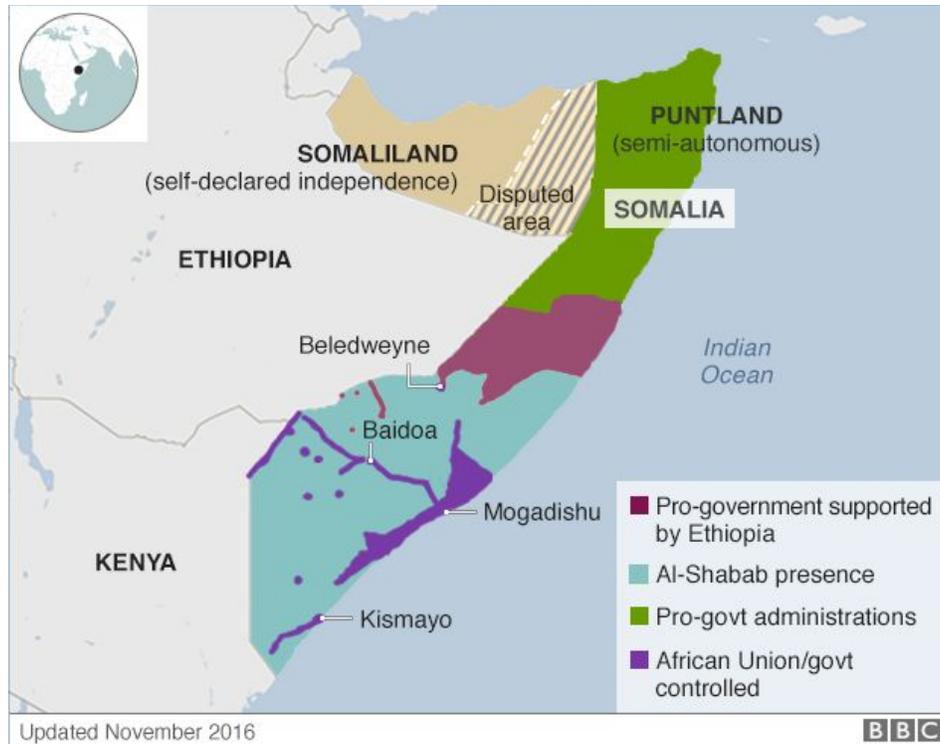
bodyguards. These guards surround me whenever I get out of the vehicle, forming a protective ring around me when I am in an exposed location. The vehicles I travel in have heavily blacked out windows, and I do not always travel in the same vehicle, or in the same position in the vehicle or the convoy. Some of the vehicles are bullet proof; this makes me feel safer than when I am in ordinary vehicles as they offer some protection from gunfire, grenades, and, to a lesser degree, suicide blasts and mortars. When I am in a non bullet/ blast proof vehicle, I feel afraid when the vehicle is stuck in traffic or otherwise stationary or going slowly, because I fear being ambushed, kidnapped, blown up by a suicide bomber/ vehicle or otherwise attacked.

8. Before I go to Mogadishu, I tell the bare minimum of people (usually only two individuals) that I am coming to the city; this includes Somalis in the diaspora as well as those in the country because news travels so fast between the two communities. I contact people I want to meet at the last minute. I often change the time and location of the meeting in order to be as unpredictable as possible. When I am in Somalia, I do not disclose on social media that I am in the country. Before I go anywhere, the person responsible for my security makes numerous phone calls to contacts in the area, and often cancels or changes arrangements at the last minute. Sometimes I am told to leave a location almost as soon as I get there. Due to the frequent suicide bombings and other major attacks in the city, my plans are often disrupted as the city goes into virtual lockdown on such occasions, with many roadblocks manned by aggressive, suspicious and jittery security forces. I have witnessed AMISOM and the Somali military and police being very rough with people on these occasions. The security forces are quick to resort to force; for instance when I was stuck in a traffic jam in Mogadishu, the guard sitting next to me rolled down the window and fired live bullets into the air in order “to move the traffic on”. In Somaliland, the security forces fired live bullets just above the heads of people in a crowd (which I was in), simply to get us to move.
9. Despite keeping as low a profile as possible, people I am barely acquainted with or do not know at all start calling me on my local number after I have been in Mogadishu or elsewhere in Somalia for a few days,. In January 2014, some Somalis in London knew I had been close to the Jazeera Palace Hotel when it was struck twice by suicide car bombs, even though I was hidden in a nearby compound with very high walls and believed only the handful of people within that compound knew I was there at the time. I find it frightening that people, some of whom I barely know and do not trust, can so quickly find out my phone number, my location and even the fact that I am in Mogadishu at all. Shortly after I returned to the UK from Somalia in April 2017, I was phoned by a member of Al Shabaab. He told me the jihadists had been ‘monitoring’ my movements in Somalia, and was able to tell me where I was on certain days, including details of what shops I visited in the south-western city of Baidoa (see Map 2 below) and what kind of guns my guards were carrying, who I met in Mogadishu and the places I visited. When I asked him how he could possibly know all these details, which I did not make public in any way, he said, “we have friends everywhere”.³ This makes me afraid that I could be targeted by anyone, including

³ Telephone call from Al Shabaab official, April 2017.

kidnappers, members of Al Shabaab and other armed groups or individuals who might have a grudge against me because of my reporting on Somalia.

10. In September 2015 the BBC High Risk team advised me to take steps to enhance my personal security in the UK as well as during trips to East Africa and the Horn of Africa due to threats of death, violence and rape I received from Somalis on social media as a result of a report I had done for the BBC. I was advised not to travel to Somalia in the near future, and to be accompanied by members of the High Risk team when I attended Somali events in the UK. I was also advised not to leave my workplace and home at the same time each day, and to alter my travel patterns. The High Risk team, directory enquiries and my local town council helped me remove from the internet any reference to my home address. This made me afraid for my safety in the UK, and for that of my children.
11. I communicate on the phone, email and social media on an almost daily basis to contacts in Mogadishu and other parts of Somalia, including members of government, the diplomatic community, the United Nations, a think tank, civil society groups, NGOs, private security companies, the security forces (Western, African and Somali) and other armed groups, including Al Shabaab. Some of these conversations are off the record. I speak regularly to the BBC reporter in Mogadishu, Ibrahim Mohamed Adan, the former BBC reporter now head of the National Union of Somali Journalists (NUSOJ), Moalimuu Mohamed and the BBC Somaliland reporter Ahmed Said Cige. I work closely with my colleagues in the BBC Somali Service in London and in the Kenyan capital, Nairobi, who cover in great detail events in the country. I also speak to other Mogadishu-based Somali journalists, often on the condition that I will not use their names in public or the names of the media organisations they work for. I speak to Somali journalists and other contacts elsewhere in the country on the same basis. Some of these conversations take the form of structured interviews, others are more informal; I absorb as much information as I can about Somalia, constantly assessing and analysing it against the knowledge I have built up over the years.
12. Some of the information in my statement has been obtained from the media (international, regional and local), books, academic journals, and public documents from think tanks, human rights groups, the United Nations, non-governmental and other organisations. I have referred to confidential UN and other security bulletins. I also used my personal knowledge of Somalia, gained from more than 25 years of reporting on and from the country, and from researching my books.
13. When I refer to 'South Central Somalia', I mean those parts of Somalia that do not include the self-declared republic of Somaliland in the north-west and the semi-autonomous region of Puntland in the north-east (see Map 2 below – South Central Somalia refers to the territory that is not marked as Somaliland, Puntland or the disputed area between them).



Map 2 - BBC map of Somalia⁴

14. I am submitting this affidavit in my capacity as a journalist, author and researcher focusing on Somalia.

The 92 Deportees Face Elevated Risk Upon Return to Mogadishu

15. News of the failed deportation flight is widespread and unwelcome in Somalia. This flight has received significant coverage in the Somali media and will be viewed as essentially dumping 92 unwanted returnees in Somalia. In my view, people, including members of Al Shabaab, will be aware of the arrival of these men, elevating the risk they will be targeted.

16. I believe an individual returning to Mogadishu after a significant period of absence would be easily identifiable as westernized, and may attract unwelcome, hostile attention. He will probably speak Somali with a different accent, and might speak it poorly, mixing it with foreign words. This may be especially pronounced when the returnee left Somalia as a child or was born as a refugee outside of Somalia.

17. I have spoken to a number of returnees during my time in Somalia and Somalis who have come back after a long period tell me they are recognised as returnees for many different reasons. They say their style of dress is different, with men wearing

⁴ BBC, *How do you solve a problem like Somalia?*, 11 May 2017, <http://www.bbc.co.uk/news/world-africa-39855735> (accessed December 2017).

Western-style shirts, shoes and trousers, instead of the traditional Somali sarong and flip flops, which is mainly worn in the evenings. Women wear different styles of robes, made from different material, sometimes with shorter sleeves. They tell me they are recognised by their weight (heavier), skin colour (lighter) and even by their gestures and the way they walk. People with tattoos or pierced ears also stand out as recently returned. I can often tell myself who the returnees are by sight or after interaction with them.

Al-Shabaab Treatment of Returnees

18. Al Shabaab continues to control many areas of Somalia. The group maintains a presence in Mogadishu and is able to attack government buildings, hotels housing government and other officials, and other targets almost at will, despite no longer having military control over Mogadishu. It carried out at least 33 car bombings in Mogadishu from January to November 2017,⁵ including a huge truck bomb attack which killed more than 500 people, most of them civilians.⁶
19. Al Shabaab seeks to eradicate all things “western” in Somalia. Many members of Al Shabaab believe returnees from the West to be in a state of apostasy, and therefore subject to punishment.⁷ The group suspects as possible spies anyone returning from the West, and executes those it finds guilty of spying.⁸ An Al Shabaab official I interviewed in December 2013 said, *“If you are a spy, there is only one punishment. You will get a one-way ticket to the day of judgement. You will be killed, whether you are a man or a woman. If you are found guilty, you will face the firing squad in a public place. Everybody must witness the killing of spies. A spy must be killed with three, four or five bullets to the head.”*⁹
20. An example of the killing of an alleged spy occurred on 11 September 2013 when Al Shabaab executed a young man in Bula Burte in the Hiraan region of central Somalia. He was killed in front of 400 people, mainly women and children.¹⁰ A BBC correspondent in Mogadishu said he receives regular reports of Al Shabaab executing

⁵ CTC Sentinel, *Foreign Technology or Local Expertise? Al-Shabaab's IED Capability*, November 2017.

⁶ CBC, *Somalia truck bombing: final death toll exceeds 500*, 2 December 2017, <http://www.cbc.ca/news/world/somalia-mogadishu-bombing-1.4430078> (accessed December 2017).

⁷ AMM and others vs The Secretary of State, 28 November 2011.

⁸ Interview with BBC Somalia reporter, Moalimuu Mohamed, September 2013; Home Office Country of Origin Information Service report, 5 August 2013, 3, 3.08-3.09, page 42, <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/coi/somalia/> (accessed December 2017); AMM and others vs Secretary of State, 28 November 2011, paragraph 408.

⁹ Telephone conversation with Al Shabaab official, 15 December 2013.

¹⁰ Email from BBC Somalia reporter, Moalimuu Mohamed, 11 September 2013.

suspected spies in many different parts of Somalia, and that there is no sign that this practice is diminishing.¹¹ These executions continue.

21. Al Shabaab on 29 December 2013 issued a specific threat against Somalis returning from the diaspora, three days before it staged a double suicide attack on the Jazeera Palace Hotel in Mogadishu, which is frequented by members of the diaspora. An Al Shabaab commander, Ali Mohamed Hussein, warned Somalis to stay away from “... *the diaspora returnees who have been taught garbage, evil and lack of religion and are being used to spread evil... They are working for the infidels and since they are working for the infidels, they are the same as the infidels they are working for as far as we are concerned. They will be killed and fought against in the same manner.*”¹²
22. Not only are returnees from Western countries at risk for being returnees, but those who may not practice their religion in a consistent manner may also lead to targeting. Alcohol and drug use are strictly forbidden by Al Shabaab and are punished severely. Even subtle differences in attitude, manner and speech could be viewed as influences from the “West” and lead to increased suspicion for spying.
23. News travels fast in Somalia, which has a strong oral culture. It is almost impossible for people to disappear or keep a low profile, including in areas where Al Shabaab is present, due to its large numbers of informers. As one Somali from the former Al Shabaab stronghold of Marka said, “they are like magical people. Wherever you go, they find you.”¹³
24. The group maintains a presence in Mogadishu and elsewhere in Somalia, and has a sophisticated spy network, known as the Amniyaat.¹⁴ At a 2016 conference on the Horn of Africa (organised by the Danish embassy and held in Kenya), delegates, including the Somalia experts Ken Menkhaus (US academic), Rashid Ali (International Crisis Group) and Abdirashid Hashi (Heritage Institute for Policy Studies), stressed again and again that Al Shabaab has infiltrated the Somali security services, the Somali government and all other key institutions. They said an individual can be a policeman by day and an Al Shabaab operative by night; a hotel receptionist can also be a key Al Shabaab informant.¹⁵ Members of recent Somali government administrations have joked with me about how ‘the enemy’ (i.e. Al

¹¹ Conversation with BBC Somalia reporter, Moalimuu Mohamed, December 2013.

¹² Sabahi Online, *Al Shabaab New Year’s Day attack rattles Somalia’s security façade*, 2 January 2014, http://sabahionline.com/en_GB/articles/hoa/articles/features/2014/01/02/feature-01 (accessed December 2017).

¹³ Interview with former resident of Marka, November 2013.

¹⁴ Combating Terrorism Centre, *Al Shabab’s capabilities post Westgate*, 24 February 2014, <https://www.ctc.usma.edu/posts/al-shababs-capabilities-post-westgate> (accessed December 2017).

¹⁵ Horn of Africa conference organised by the Danish Embassy, Nairobi, Kenya, 13-14 December 2016.

Shabaab) cannot be defeated because it exists right at the heart of federal government and is 'present during cabinet meetings'.¹⁶ In this way, Al Shabaab can successfully target officials and keep track of individuals.

25. The October bombing that killed 512 people and injured more than 300 is widely referenced as "Somalia's 9/11," an historic terrorist attack that has transformed public understanding inside Somalia about Al Shabaab's capacity to harm its perceived enemies.
26. The instability and attacks from Al-Shabaab have caused security forces to often overreact, or view people with increased suspicion. Security forces, especially in Mogadishu have been known to round up suspected people and either arrest them or even kill them as spies or insurgents.

I declare under penalty of perjury that the foregoing is true and correct.

Mary Harper

Mary Harper

Date: 12/18/17

¹⁶ Conversations with government ministers in the administrations of President Hassan Sheikh Mohamud and Mohamed Abdullahi Farmajo.

I declare under penalty that the
foregoing is true and correct.

Mary Harper

18 December 2017

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA**

Farah IBRAHIM, Ibrahim MUSA, Khalid Abdallah MOHMED, Ismail JIMCALE ABDULLAH, Abdiwali Ahmed SIYAD, Ismael Abdirashed MOHAMED, and Khadar Abdi IBRAHIM on behalf of themselves and all those similarly situated,

Plaintiffs/Petitioners,

Case No.:

v.

CLASS ACTION

Juan ACOSTA, Assistant Field Officer Director, Miami Field Office, Immigration and Customs Enforcement; David HARDIN, Sheriff of Glades County; Marc J. MOORE, Field Office Director, Miami Field Office, Immigration and Customs Enforcement; Thomas HOMAN, Acting Director, Immigration and Customs Enforcement; Kirstjen NIELSEN, Secretary of Homeland Security.

Defendants/Respondents.

DECLARATION OF ABDINASIR M. ABDULAH

Pursuant to 28 U.S.C. § 1746(2), I, Abdinasir M. Abdulahi, hereby declare as follows:

1. My name is Abdinasir M. Abdulahi. I am an attorney licensed to practice in the State of Minnesota. I hold a Juris Doctorate from William Mitchell College of Law in St. Paul, Minnesota, a Master of Laws from the University of Minnesota School of Law, and a law degree from Addis Ababa, Ethiopia. Before coming to the United States, I served as a Chief Justice of the Somali Region in Ethiopia's Supreme Court. I am fluent in English and Somali.
2. I will herein summarize some of the widespread news coverage of the December 7th flight en route to Mogadishu, Somalia from Louisiana, United States of America.
3. The flight garnered a wide range of coverage across the Somali media landscape. These sources all discuss the attempted deportation of Somali men from the United States to Somalia. I reviewed the following articles:

<http://gundhig.com/cilad-ku-timid-diyaarad-siday-soomaali-laga-soo-tarxiilay-mareykanka/> (December 9, 2017)

<https://www.jowhar.com/wararka/cilad-ku-timid-diyaarad-siday-soomaali-laga-soo-masaafuriyay-dalka-mareykanka.html> (December 9, 2017)

<http://radioshabelle.com/cilad-ku-timid-diyaarad-siday-muwaadiniin-soomaaliyeed-oo-laga-soo-musaafuriyay-maraykanka/> (December 9, 2017)

<https://www.caasimada.net/diyaarad-siday-soomaali-laga-soo-tarxiilay-mareykanka-oo-hawada-ku-ciladowday/> (December 9, 2017)

https://www.hiiraan.com/news/2017/dec/wararka_maanta9-143852.htm (December 9, 2017)

<https://www.garoweonline.com/so/news/somalia/cilad-ku-timid-diyaarad-siday-soomaali-laga-soo-tarxiilay-mareykanka> (December 9, 2017)

4. I have also listened to the audio of a BBC Somali newscast on December 15, 2017, which discussed the deportation of the 92 men. The BBC broadcast included an interview with one of the parents, Fardowso Mohamud Omar. Ms. Omar expressed her fear and concern over the deportation of her son. She said her son came to the United States when he was a child. Her son was raised here in the US. He is now married and has children of his own. Her son's father was previously killed in Somalia. <http://www.bbc.com/somali/war-42371713>
5. On December 9, 2017, VOA (Voice of America) Somali version, interviewed a Somali-American who expressed the community's dismay over this incident. <https://www.voasomali.com/a/4156414.html>.
6. The majority of Somalis both inside Somalia and in the diaspora tune in to BBC and VOA Somali radio segments for their daily news intakes.

I declare under penalty of perjury that the foregoing is true and correct.

Abd. Ali
Abdinasir Abdullahi

Date: 12/18/17



U.S. Department of Justice

Executive Office for Immigration Review

*Board of Immigration Appeals
Office of the Clerk*

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

Hunter, Kimberly K
Kim Hunter & Associates
656 Selby Avenue
Suite 100
St. Paul, MN 55104

DHS/ICE Office of Chief Counsel –BLM
(MSP)
1 Federal Drive, Suite 1800
Ft. Snelling, MN 55111

Name: S [REDACTED], A [REDACTED] A [REDACTED]

A [REDACTED] 700

Date of this notice: 12/5/2017

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Guendelsberger, John

show
User team: Docket

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: [REDACTED] 700 – Bloomington, IN

Date: DEC - 5 2017

In re: A [REDACTED] A [REDACTED] S [REDACTED]

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Kimberly K. Hunter, Esquire

ON BEHALF OF DHS: James S. Stolley, Jr.
Chief Counsel

APPLICATION: Reopening

ORDER:

The respondent has filed a motion requesting the Board reopen his removal proceedings. The Department of Homeland Security opposes reopening. Given the particular evidence and arguments presented in this case, we conclude the respondent has established changed conditions in the country of removal materially impacting his eligibility for asylum, withholding of removal, or protection under the Convention Against Torture. *See* 8 C.F.R. § 1003.2(c)(3)(ii). Therefore, we conclude reopening is warranted. Upon remand, the respondent should be able to present arguments regarding his removability under current case law applying the categorical approach. In reopening and remanding we intimate no opinion regarding the ultimate outcome of the respondent's proceedings. The motion to reopen is hereby granted.

FURTHER ORDER: The record is remanded to the Immigration Judge for further proceedings consistent with the foregoing opinion and for the entry of a new decision.



FOR THE BOARD

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION**

Farah IBRAHIM, Ibrahim MUSA, Khalid
Abdallah MOHMED, Ismail JIMCALE
ABDULLAH, Abdiwali Ahmed SIYAD,
Ismael Abdirashed MOHAMED, and
Khadar Abdi IBRAHIM on behalf of
themselves and all those similarly situated,

Case No.: _____

Plaintiffs/Petitioners,

v.

**DECLARATION OF
TRINA REALMUTO**

Juan ACOSTA, Assistant Field
Officer Director, Miami Field Office,
Immigration and Customs Enforcement;
David HARDIN, Sheriff of Glades
County; Marc J. MOORE, Field Office
Director, Miami Field Office, Immigration
Customs Enforcement; Thomas HOMAN,
Acting Director, Immigration and Customs
Enforcement; Kirstjen NIELSEN,
Secretary of Homeland Security.

Defendants/Respondents.

I, Trina A. Realmuto, declare under penalty of perjury as follows:

1. I am make this affidavit based upon my own knowledge. This Affidavit is made in support of Plaintiffs/Petitioners in the above-referenced matter. I have personal knowledge of the facts in this declaration, and would be competent to testify thereto.

2. I am an attorney licensed to practice law before the courts of the States of New York and California, the United States District Courts for the Southern and Eastern Districts of New York and the Northern, Southern, Eastern and Central Districts of California, the District of Vermont,

the District of Connecticut, as well as the United States Courts of Appeals for the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits and the U.S. Supreme Court. I was admitted to the New York and California bars in 1998 and 1999, respectively. I have practiced immigration law since that time, first as an associate attorney at the law firm of Van Der Hout & Brigagliano (now Van Der Hout, Brigagliano & Nightingale LLP), later as an attorney consultant to the American Immigration Law Foundation (now the American Immigration Council). From 2009 to 2017, I was a Staff Attorney and then Litigation Director for the National Immigration Project of the National Lawyers Guild (NIPNLG). I am presently employed as the Directing Attorney of the Boston Office of the American Immigration Council.

3. As part of my responsibilities with NIPNLG, I routinely mentored attorneys on immigration issues and continue to do so for the American Immigration Council. With respect to stay-related issues, I estimate that I have consulted with, and provided advice to at least 120 attorneys. I am also a co-author of a practice advisory entitled, *Seeking a Judicial Stay of Removal in the Court of Appeals*, which is available online.

4. I make this affidavit to explain the work that is required for a competent and ethical motion to reopen an immigration case and to explain why the system available for seeking and obtaining an emergency stays of removal from an immigration judge (IJ) or the Board of Immigration Appeals (BIA or Board) is not reliable and does not ensure that meritorious stay motions will be heard and adjudicated while a motion to reopen is pending. There are many ways in which immigration court and BIA stay practice can and does go wrong.

Difficulties with Expediently Preparing Motions to Reopen

5. When someone is the subject of a final removal order but has a viable claim that their removal order is unlawful or that they are now eligible for immigration relief or protection, the most common method for adjudication of that claim is to file a motion to reopen with either the immigration court or the BIA, depending on the procedural history of the case. The motion must include “the appropriate application for relief and all supporting documentation.” 8 C.F.R. § 1003.2(c)(1).

6. Investigating the viability of a claim for reopening can be a complicated endeavor. An immigration attorney who did not represent the noncitizen in the removal proceeding has an ethical obligation to ensure that any motion filed is not frivolous. Compliance with this obligation generally is contingent upon obtaining the complete record of proceedings and new and previously unavailable evidence, both of which are necessary to permit a full review of a claim.

7. Attorneys have an ethical obligation to fully and competently assess the merits of a claim before seeking reopening on behalf of existing clients. Model Rule 1.1 entitled “Competence” mandates “competent representation” which “requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” Model Rules of Prof’l Conduct R. 1.1 (2015). Comment 5 to that rule elaborates on this requirement, stating:

Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence. . . .

Model Rules of Prof'l Conduct R. 1.1 cmt. 5 (2015). In immigration cases, "what is at stake" is the person's ability to vacate a removal order and reopen proceedings, which often is the difference between permanent exile from the United States and living in the country with family and friends. In this case, the stakes are even higher; Plaintiffs/Petitioners and putative class members nationals risk grievous harm, if they are removed.

8. The process for an attorney to comply with ethical and regulatory obligations in preparing motions to reopen is time-consuming for at least two reasons. First, where counsel did not represent the person previously, counsel needs to obtain the complete record of proceedings to understand what transpired in the removal proceeding and to assess the viability of a claim for reopening. Second, by statute and regulations, motions to reopen require substantial new evidence, which takes time to gather and assemble. *See generally* 8 U.S.C. § 1229a(c)(7)(B); 8 C.F.R. § 1003.2(c)(1).

9. New counsel will need to obtain both written and audio files concerning the individual's case. This includes at a minimum both the A-File (the comprehensive file of a person's immigration history kept by the Department of Homeland Security) and the Record of Proceedings (the immigration court file kept by the Executive Office for Immigration Review, which consists of the immigration courts and the BIA). The A-File is accessed by a Freedom of Information Act (FOIA), 5 U.S.C. § 552, request to the U.S. Citizenship and Immigration Service (USCIS). However, if a person has had any interaction with U.S. Customs and Border Protection, it is advisable to also file a FOIA request with CBP to obtain records from that

agency's file. The Record of Proceedings is accessed by a FOIA request to EOIR. If the person previously filed an appeal to the BIA, the Record of Proceedings should contain the transcript of the prior proceedings. However, if the person did not previously appeal to the BIA, an audio tape may be available or the attorney can try to arrange to listen to the audio tape of the prior proceeding at the immigration court that heard the case. Even if the person had counsel, incompetent or predatory prior counsel often will not or cannot provide the appropriate information. It is the individual agency processing the FOIA request that controls how long it will take to produce the requested records. At present, USCIS has a backlog of over 35,000 FOIA requests and generally takes several months to produce an A-file. In my experience, EOIR requests can take several weeks to months as well. Records that are older can take longer than others.

10. The A-file and the Record of Proceedings serve a different purpose. The A-file contains the paperwork documenting the individual's immigration history. For example, it can contain the paperwork related to a person's first entry on a visa, previously filed asylum applications, and previous statements to immigration officers. It is imperative to review the A-file to fully understand the person's immigration status, to adequately assess relief options, and to find support for potential factual or legal errors in the proceeding. The Record of Proceedings consists of the trial court and appeal records. Without the Record of Proceedings, it is impossible to know whether: (1) a client was properly informed of his or her rights, including the rights to counsel, to contest the charges of alienage and removability, to present and cross-examine evidence, to seek relief or protection from removal, and the right to appeal; (2) the removal hearing was conducted in a fair and impartial manner by the immigration judge; (3)

prior counsel was effective (or not); (4) any previously submitted evidence was improperly overlooked or discounted; (5) the client knowingly, intelligently, and voluntarily waived any of his or her rights; and (6) the factual and legal bases underlying the client's removal order and/or denial of relief or protection were correct. Review of both the A-file and complete Record of Proceedings is absolutely critical to ascertaining whether there is a viable basis for a motion to reopen. After receiving the FOIA results, counsel must carefully review these records. She must then consult with her client and often perform additional research and investigation, particular in cases involving changed country conditions.

11. In addition, researching and collecting substantial new evidence to support a motion to reopen, particularly evidence to support a motion based on changed country conditions, can take significant time and effort both by the attorney and by the noncitizen and/or his or her family. The reopening statute requires that motions "shall be supported by affidavits or other evidentiary material." 8 U.S.C. § 1229a(c)(7)(B). The implementing regulations further mandate that the evidence is "material and was not available and could not have been discovered or presented at the former hearing," as well as either evidence that the immigration judge did not "fully explain[]" the opportunity to apply for relief at the prior hearing or evidence that relief is now available due to "circumstances that have arisen subsequent to the hearing." 8 C.F.R. § 1003.2(c)(1).

12. Every case is different, but it would not be unreasonable for obtaining and reviewing a client's record to require between 10-20 hours of work, even before research and writing can begin. For example, in one of my cases, the A-file was 1,000 pages and the Record of

Proceedings was over 600 pages and included an audio file. In my opinion, it is reasonable to estimate that after the A-file and Record of Proceedings is obtained, a lawyer with an active removal docket may take somewhere between 6 - 12 weeks to adequately prepare and file a motion to reopen, including preparation of the underlying application for relief. Counsel who are handling a higher volume of cases may require more time. Additional time also would be needed in circumstances where it is difficult for the attorney and client to communicate, for example, if the client is detained far from the attorney, or is not proficient in English.

Difficulties Related to Emergency Stay Motions

13. If a person with a final order of removal faces the prospect of imminent removal, and has a viable basis for a motion to reopen or motion to reconsider, the necessary motion may be accompanied by an emergency stay motion. Significantly, as set forth in the Board of Immigration Appeals Practice Manual, the BIA will not consider a motion for a discretionary and/or emergency stay unless it is accompanied by an appeal, a motion to reopen, or a motion to reconsider. In my experience, most adjudicators are more inclined to grant a stay if there is a possibility that the appeal or motion ultimately will succeed. Thus, I routinely advise attorneys to file substantive motions in conjunction with stay requests, which, as discussed above, is extremely hard to do when either removal is imminent or the attorney never represented the person before and does not have any of the records.

14. Filing an emergency stay motion does not obligate ICE to halt a deportation. Rather, either an IJ or the BIA actually must grant the stay motion before ICE has a legal obligation to halt a deportation. In addition, according to the Board of Immigration Appeals Practice Manual, an emergency stay motion may be submitted only when an individual is in physical custody and

is facing imminent removal. As such, an individual who is not in ICE's custody must surrender to ICE's custody before the BIA will consider an emergency stay motion.

15. Notably, neither the Board of Immigration Appeals nor the immigration court has promulgated any standard for granting a stay of removal, by precedential opinion, practice manual, or other method. The lack of any such standard has caused great confusion among the immigration bar, leaving attorneys to guess what factors may warrant granting a stay.

16. A case I handled as counsel for a man fearing persecution and torture in his country of origin well illustrates some of the practical obstacles faced by attorneys seeking emergency stays of removal in conjunction with the filing of a motion to reopen before the BIA. After filing a motion to reopen and emergency stay request, I called the Emergency Stay Coordinator at the BIA, who first informed me that I would have to wait 24-48 hours for the BIA to docket the stay motion and instructed me to call the BIA back with the deportation officer's name and telephone number once the motion had been docketed. After the overnight courier company confirmed that the BIA had received the motion, I called the BIA back. I learned that the stay motion was not yet docketed and that it could take a while for the motion to reopen and stay request to make its way from the BIA mailroom to the office where it would be docketed. Nevertheless, I provided the BIA staff person with the deportation officer's information. The following week, I called the BIA again and was told that:

(a) the BIA did not have the deportation officer's contact information and that the BIA staff would not have been allowed to take such information before the motion was docketed (contrary to what the same unit told me the week before);

(b) BIA staff would call the deportation officer to find out if DHS has travel documents and if removal is imminent;

(c) if the BIA did not reach the deportation officer and/or he did not call them back (after how much time she did not say), the then the “stay unit” would assume removal is imminent and would ask a Board member to rule;

(d) if the deportation officer informs the BIA that ICE does not have travel documents, the BIA staff will *ask* the deportation officer to inform the BIA when they get them and to share the expected deportation date; and

(e) if ICE does not have travel documents, the BIA stay unit will not ask a Board member to rule on the emergency stay motion because “the Board only rules if deportation is imminent.”

17. After hearing this, I asked the BIA stay unit staff member whether deportation officers were under any obligation to advise the BIA when ICE obtains travel documents or has scheduled a deportation. Her answer was that every deportation officer is different. I explained that none of this information about the need to provide officer contact information or the BIA’s adjudication process is in the Board of Immigration Appeals Practice Manual and it would be helpful for attorneys to have this information. The response I received was again that every deportation is different and that the best way to get information is by calling the BIA. Nearly one month after I filed the emergency stay request and motion to reopen and after several follow up calls to the BIA stay unit, the BIA finally granted the emergency stay motion.

18. My experience with seeking a stay from the BIA in the aforementioned case is consistent with the experiences of many of the attorneys with whom I have consulted and advised on stay-related issues. Practitioners are overwhelmingly concerned that their clients may be deported before the BIA, or an IJ, has had an opportunity to review the merits of a stay request, much less the underlying motion to reopen. Much of this concern stems from the fact that whether the BIA will adjudicate a stay motion prior to deportation relies entirely on the deportation officer's discretionary act of communicating to the BIA the actual date and time of deportation (and any change to the date and time of deportation).

19. To make matters worse, ICE officers routinely refuse, purportedly for security reasons, to provide attorneys with any details regarding the date and time of even imminent deportations. Thus, while the IJ/BIA and ICE all are privy to this critical information, the noncitizen at risk of deportation and his/her attorney are left in the dark. Even if a pro se detainee were somehow able to prepare a motion to reopen and emergency motion for a stay, he or she would have no way to know when the IJ or BIA would adjudicate the stay motion.

20. Sometimes, ICE officers will tell an attorney that the deportation date is "imminent" or "soon" without giving any further information. In this situation, the attorney frequently has only a few days—or even a few hours—to file an emergency stay motion (in conjunction with a pending or yet-to-be filed motion to reopen) *and* try to ensure that BIA staff succeed in obtaining confirmation of the deportation date so that the BIA will actually adjudicate the motion before ICE executes the deportation.

21. I am aware of the details of at least two cases where ICE affirmatively informed the BIA of particular deportation dates but subsequently—unbeknownst to the BIA, and without

providing the BIA any notice—moved up the dates of deportation and carried out the removal. In those cases, ICE either affirmatively misrepresented the deportation dates or neglected to inform the BIA of the new deportation date. In at least one of the cases, the BIA adjudicated, and granted, the person's stay request too late; the deportation already had taken place. These cases illustrate that there is no formal mechanism by which ICE is required to notify the BIA of a change in deportation date and, therefore, no way to ensure that the BIA has a meaningful opportunity to adjudicate the stay motion before deportation.

22. I believe the problem just identified is widespread. As far as I am aware, ICE has no legal obligation to provide and/or update the BIA or an IJ with notice of the date and time of a deportation to ensure that a stay motion is timely adjudicated. This lack of any obligation combined with ICE's refusal to provide noncitizens or their attorneys with a deportation date has contributed to, and I believe will continue to contribute to, the execution of removal orders before the BIA or an IJ has had an opportunity to review and adjudicate the stay motion.

23. Based on my communications with other attorneys, I believe that attorneys seeking emergency stays of removal from immigration judges face some of the same procedural obstacles as those faced by attorneys seeking emergency stays before the BIA. These include delays in receipt of the stay motion and reluctance to rule on a stay motion until the IJ is satisfied that deportation is imminent. In addition, where a person seeks an emergency stay from an immigration court in conjunction with a motion, the timing for adjudication of the stay motion is entirely dependent on the schedule of that particular immigration judge (as opposed to any number of BIA judges who might adjudicate the stay motion). For example, if a stay motion is filed at 9:00am and deportation is scheduled for 10:00am, the immigration judge may be

conducting a hearing in court and, therefore, unaware, unable, or perhaps unwilling to timely adjudicate the emergency stay motion prior to the deportation.

24. Securing an emergency stay is challenging and time-consuming even for experienced immigration attorneys. Securing an emergency stay without counsel is even more difficult. The vast majority of noncitizens in removal proceedings are unfamiliar with the intricacies of immigration law or even basic legal process. Without competent counsel to advise of the possibility of filing an emergency stay motion in conjunction with a motion to reopen, most pro se noncitizens will be unaware of this procedure. Even if they were aware, they must articulate legal arguments and produce new and compelling evidence. These individuals may have little or no formal education and/or face a language barrier that makes this task even more daunting. Noncitizens who are detained face additional obstacles attendant to their detention.

25. In short, neither the immigration courts nor the BIA have reliable or sufficient procedures to ensure individualized assessment of the appropriateness of an emergency stay that would provide an opportunity for reasoned decision-making about whether individuals who have filed motions to reopen should or should not face removal while those motions are pending.

Signed under the pains and penalties of perjury this 18th day of December, 2017.


Trina A. Realmuto

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

Farah IBRAHIM, Ibrahim MUSA, Khalid Abdallah MOHMED, Ismail JIMCALE ABDULLAH, Abdiwali Ahmed SIYAD, Ismael Abdirashed MOHAMED, and Khadar Abdi IBRAHIM on behalf of themselves and all those similarly situated,

Plaintiffs/Petitioners,

v.

Juan ACOSTA, Assistant Field Officer Director, Miami Field Office, Immigration and Customs Enforcement; David HARDIN, Sheriff of Glades County; Marc J. MOORE, Field Office Director, Miami Field Office, Immigration and Customs Enforcement; Thomas HOMAN, Acting Director, Immigration and Customs Enforcement; Kirstjen NIELSEN, Secretary of Homeland Security.

Defendants/Respondents.

Case No.:

CLASS ACTION

**ORDER GRANTING
PETITIONER
EMERGENCY MOTION
FOR TEMPORARY
RESTRAINING ORDER
AND STAY OF REMOVAL**

**ORDER GRANTING PLAINTIFFS'/PETITIONERS'
EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER
AND STAY OF REMOVAL**

THIS CAUSE is before the Court upon Plaintiffs'/Petitioners' Emergency Motion For Temporary Restraining Order and Stay of Removal. The Court, having reviewed the Motion and being fully advised in the premises, finds that Petitioner has demonstrated a need for a temporary restraining order in this case.

Accordingly, it is **ORDERED** and **ADJUDGED** that Plaintiffs'/Petitioners' Motion is **GRANTED**. Defendant/Respondents and all of their respective officers, agents, servants, employees, attorneys, and persons acting in concert of participation with them are *immediately*:

- a. Enjoined from deporting Plaintiffs'/Petitioners and the class members they represent until 1) they are afforded a full and fair opportunity to seek reopening of their removal

- cases; 2) they have received adequate medical treatment for their injuries sustained on the December 7 flight; and 3) Defendants/Respondents have taken precautions to ensure that Plaintiffs and the class they represent will not be again abused during the deportation process, including but not limited to assurances that none of the same ICE or contract agents that were on the December 7 flight will be on the next flight.
- b. Enjoined from transferring Plaintiffs/Petitioners and the class members they represent from Krome Service Processing Center, Miami, Florida or Glades Detention Center, Moore Haven, Florida.
 - c. Ordered to return any class members to South Florida who have been transferred to a different location.

This Order shall remain in full force and effect for fourteen (14) days pending further proceedings.

This Court has exercised its discretion to determine that no bond shall be required and that this Order shall be effective immediately.

DONE and ORDERED in Chambers at Miami, Florida, this ____ day of December, 2017.

THE HONORABLE _____
UNITED STATES MAGISTRATE JUDGE