

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
Case No. 0864 0:13CR00222-001 (MJD)

UNITED STATES OF AMERICA,

Plaintiff,

v.

SAYNAB ABDIRASHID HUSSEIN,

Defendant.

**SAYNAB HUSSEIN'S
SUPPLEMENTAL POSITION
REGARDING SENTENCING**

Defendant Saynab Hussein, by and through her undersigned attorneys, submits this Supplemental Position Regarding Sentencing in response to Court's request for additional briefing on the issue of how Ms. Hussein's sentence might affect her immigration status.

In its Supplemental Position Regarding Sentencing (the "Government's Memorandum"), the government asserts that the length of Ms. Hussein's sentence will have no impact on her immigration status because she will be removable, in any event, based on her "conduct alone." In asserting this argument, the government presumes that its own view of Ms. Hussein's "conduct" is proven fact. It is not. Indeed, the standard of proof required to deport Ms. Hussein is much higher than the standard of proof applicable to her sentencing. Thus, whatever findings this Court might make in applying the Sentencing Guidelines would not be conclusive in a deportation proceeding.

This distinction is hugely significant. The government acknowledges that if the Court sentences Ms. Hussein to a year or more of confinement she will be deportable as

an “aggravated felon,” and will be subject to mandatory detention upon the completion of her sentence pending removal proceedings. (Government’s Mem. at 2 n.1.) In that event she would have no defenses to removal, because her conviction alone would establish proof of her deportability. If, on the other hand, the Court sentences Ms. Hussein to less than a year of confinement, she will be presumed not deportable, unless the Department of Homeland Security (“DHS”) otherwise proffers sufficient proof to establish “by clear and convincing evidence” that she engaged in conduct that would make her deportable. As discussed below, DHS would encounter significant difficulty in attempting to meet this burden of proof.

I. MS. HUSSEIN WILL BE DEPORTABLE IF THE COURT SENTENCES HER TO A TERM OF ONE YEAR OR LONGER.

The parameters of the applicable legal framework are not in dispute. The government agrees that if Ms. Hussein is sentenced to less than 365 days in prison, her conviction would not be a basis for deporting her because she has lived in the United States for more than five years. 8 U.S.C. § 1227(a)(2)(A)(i); (Government’s Mem. at 2). In contrast, the offense of perjury with which Ms. Hussein has been charged would be deemed an “aggravated felony” if she is sentenced to a term of imprisonment of one year or longer. 8 U.S.C. § 1101(a)(43)(s). Conviction for an aggravated felony constitutes automatic grounds for removal. 8 U.S.C. § 1227(a)(2)(A)(iii); (Government Mem. at 4, “Should the defendant suffer a conviction for an aggravated felony, the defendant would be removable.”) Even if DHS decided not to deport Ms. Hussein immediately—because of current conditions in Somalia, because Ms. Hussein is currently valuable to the

government as a potential witness, or for any other reason—the conviction would follow her for the rest of her life and she would be subject to deportation at any time DHS chose to deport her. Her life in the United States, her nursing career and her family would always be in jeopardy.

II. THE STANDARD OF PROOF REQUIRED TO DEPORT MS. HUSSEIN BASED ON CONDUCT ALONE HAS NOT BEEN MET.

The government asserts that Ms. Hussein “may” be subject to removal, regardless of the sentence imposed, on security and other related grounds. (Government’s Mem. at 4.) The government’s use of the word “may” here is telling. While DHS could potentially argue that Ms. Hussein is subject to removal on security grounds, in order to actually deport Ms. Hussein it would have to prove its claims to the Immigration Court by “clear and convincing evidence.” 8 U.S.C. § 1229a(c)(3)(A) (“In the proceeding the Service has the burden of establishing by clear and convincing evidence that, in the case of an alien who has been admitted to the United States, the alien is deportable.”) In other words, the question of whether Ms. Hussein’s conduct should subject her to the draconian punishment of deportation to Somalia would be fully vetted, evaluated and decided under a heightened standard of proof by an Immigration Court that is practiced in applying the provisions of the Immigration and Nationality Act (“INA”). It would not be resolved finally and conclusively based on this Court’s application of the Sentencing Guidelines under a preponderance standard of proof. *See United States v. Manuel Villareal-Amarillas*, 562 F.3d 892, 897 (holding that “due process never requires applying the clear and convincing evidence standard to judicial fact-finding at criminal sentencing”); *United*

States v. Mustafa, 695 F.3d 860, 862 (reasoning that since *United States v. Booker* made the Sentencing Guidelines advisory, “we have repeatedly held that ‘due process never requires applying more than a preponderance-of-the-evidence standard for finding sentencing facts, even where the fact-finding has an extremely disproportionate impact on the defendant’s advisory sentencing range.’”) (internal quotes omitted).

The government argues that the “question central” to Ms. Hussein’s immigration status is whether she engaged in “terrorist activity” as defined under the INA. (Government’s Mem. at 10.) But if the Court sentences her to a term of imprisonment of a year or longer, this question will never be addressed, because DHS will be able to deport her solely on grounds of her conviction for an “aggravated felony.”

An Immigration Court asked to consider this question would be presented with information that would undermine the claim that Ms. Hussein engaged in “terrorist activity” as defined under the INA. For example, the government points to the provision of the INA that defines soliciting funds for a terrorist organization as “terrorist activity.” 8 U.S.C. § 1182(a)(3)(B)(iv). But there is no evidence to suggest that, at the time of any fundraising Ms. Hussein may have done, she was aware of Al Shabaab or the terrorist activities with which it has been accused. Indeed, there is no evidence that even the *government* considered Al Shabaab to be a terrorist organization, since it did not designate Al Shabaab as a “terrorist organization” until February 26, 2008, or notify the public of that designation until March 18. Public Notice 6137, 73 Fed. Reg. 14,550 (March 18, 2008). These and other exculpatory facts would have to be considered by the Immigration Court in assessing whether DHS had met its elevated standard of proof. The

government's assumption that Ms. Hussein's sentence will have no impact on her immigration status is ill-founded for these reasons.

III. RELIEF FROM REMOVAL IS NOT A REALISTIC OPTION.

The government cites to several provisions of the INA for the proposition that Ms. Hussein "may" be eligible for legal relief or protection from removal. The government nevertheless admits that most avenues for relief or protection from removal would not apply if the Court sentences Ms. Hussein to an aggravated felony. (*See* Government's Mem. at 6-10.)

The government asserts, however, that Ms. Hussein could be eligible for deferral of removal under the Convention Against Torture ("CAT"), if she can prove that it is more likely than not she will be tortured by or with the acquiescence of the government of the country to which she would be removed. 8 C.F.R. § 12.0818(a). According to the government, "Whether an immigration judge would grant the defendant deferral from removal under CAT cannot reasonably be predicted with any certainty." (Government's Mem. at 10.) While the government's description of the legal requirements for deferral from removal is accurate, and Ms. Hussein is indeed deeply concerned that if she is deported to Somalia her decision to cooperate with the government could subject her to violent retribution, the government's contention that whether Ms. Hussein could obtain deferral is unpredictable is wrong. CAT petitions are granted with extreme rarity, and deferral from removal under CAT is even more rare. According to the U.S. Department of Justice Executive Office for Immigration Review ("EOIR"), the immigration courts adjudicated 29,796 CAT petitions in 2012. Of those, only 643 were granted. (EOIR,

FY2012 Statistical Year Book, <http://www.justice.gov/eoir/statspub/fy12syb.pdf>, March 2013, at M1, Ex. A.) The great majority of those cases involved withholding from removal, with just 129 cases involving deferral (the only form of CAT relief for which an aggravated felon is eligible). (*Id.*) In other words, the immigration courts granted deferral from removal in less than half of one percent of the cases they adjudicated in 2012. Based on these statistics, the likelihood of Ms. Hussein obtaining relief under CAT if she is convicted of an aggravated felony is extraordinarily low.

Moreover, deferral from removal is, by definition, a temporary form of relief. Once granted, deferral may be “quickly and easily terminated” if it is later determined that the individual is no longer “more likely than not” to experience torture. 8 C.F.R. § 1208.17(d). Thus, even if Ms. Hussein were to beat the extreme odds and obtain relief under CAT, she would forever remain at risk of having her life, livelihood and family destroyed in the future.

IV. THE GOVERNMENT’S ASSERTED POSITION ON DEPORTATIONS TO SOMALIA IS UNRELIABLE.

The government asserts that, since mid-October 2013, “local DHS” has not been attempting to remove people to Somalia. (Government’s Mem. at 11.) While that statement may be technically accurate, the government does not deny that as recently as September 2013, it in fact *was* deporting people to Somalia. DHS very well could change its position on deportations to Somalia again tomorrow and, as it did last September, could begin deporting again quietly and without notice to any other authority or the public.

Nor does the government purport to assert whether any division of DHS elsewhere in the United States may have adopted the same practice. Because Ms. Hussein's home is in Tennessee, presumably a decision by "local DHS" not to deport people to Somalia would offer her little comfort. For these reasons the Court should not rely on the government's representation that removals to Somalia are not presently occurring.

V. MS. HUSSEIN'S CIRCUMSTANCES ARE ATYPICAL.

Next, although the government acknowledges the Court may consider the collateral consequences arising from Ms. Hussein's immigration status in sentencing her, it asserts that a departure is not appropriate in her case because her circumstances are "typical" of any other alien sentenced in federal court. Nothing could be further from the truth. As the government has acknowledged, unlike most perjury defendants, Ms. Hussein faces a high likelihood of additional confinement in a DHS facility upon the completion of her sentence. The consequences of this additional confinement should be taken into account.

Moreover, Ms. Hussein is not an ordinary offender. She arrived in the United States with her mother and siblings as a refugee when she was only ten years old and has resided here legally ever since. This case involves her first and only offense, and she has worked hard since graduating from high school to obtain a nursing degree so that she can help others and become a productive member of the workforce. She is a loving wife and mother to a small toddler. Because she is his primary caregiver, a term of imprisonment of any length would undoubtedly affect him deeply, but if she is deported the impact on

him would be devastating. Both Ms. Hussein's husband and their child are United States citizens, and would remain in the United States if she is deported.

This fact distinguishes Ms. Hussein's case from *United States v. Wright*, 218 F.3d 812 (7th Cir. 2000), which the government cites for the proposition that the ordinary effect of a mother's long incarceration on her child did not justify a downward departure. (Government's Mem. at 12.) In *Wright*, the court reasoned that a child would be unlikely to understand the difference between knowing his mother would be released when he was nineteen versus knowing she would be released five years later. *Id.* at 815. Here, in contrast, the difference to Ridwaan between losing his mother for a year or two (with the possibility of visitation) and losing her permanently (with no possibility of visitation) would be monumental.

Moreover, the consequences of Ms. Hussein's potential deportation would be extraordinarily harsh. She and her family fled Somalia as refugees when she was only one year old and spent the next nine years in refugee camp. She has not been back since. In *United States v. Ferreria*, 239 F. Supp.2d 849 (E.D. Wis. 2002), the Court granted a downward departure based on similar facts. The defendant in *Ferreria* was a Mexican citizen charged with conspiracy to distribute cocaine. He had no prior record and had been gainfully employed as a truck driver. He arrived in the United States from Mexico with his siblings when he was just fifteen years old. He had lived in the United States as a lawful permanent resident for twenty-five years and had no prior record. He had several children who were United States citizens, had a close relationship with their mother, and by all accounts was a devoted father. Based on these facts the court departed

downward, finding that these circumstances were extraordinary. *Id.* at 852-56 (distinguishing these facts from those at issue in *United States v. Bautista*, 258 F.3d 602, 606 (7th Cir. 2001), on which the government relies).

The facts in Ms. Hussein's case are even more compelling than those at issue in *Ferreria*. Not only is Somalia entirely unfamiliar to Ms. Hussein—it would be an extraordinarily dangerous place for a young woman such as Ms. Hussein to live. Her cooperation with the government in this case is now a part of the public record and is presumably known to the Somali community. Returning her to Somalia would make her a prime target of the same terrorists with whom the government has accused her of associating. The government callously argues that she is no different than a “cooperating Mexican-citizen drug trafficker with a family in the United States returning to a cartel-controlled Mexico.” (Government Mem. at 13.) In making this argument the government demonstrates a complete lack of compunction about the prospect of sending defendants accused of relatively minor offenses to their deaths. Furthermore, the government ignores the reality that Somalia is different. Unlike Mexico, Somalia is a country without a central functioning government that is capable of stepping in to protect its citizens. According to the U.S. State Department:

The security situation inside Somalia remains unstable and dangerous. Terrorist operatives and armed groups in Somalia have demonstrated their intent to attack Somali authorities, the African Union Mission in Somalia (AMISOM), and other non-military targets. Kidnapping, bombings, murder, illegal roadblocks, banditry, and other violent incidents and threats to U.S. citizens and other foreign nationals can occur in any region of Somalia. ... Inter-clan and inter-factional fighting can flare up with little or no warning. This type of violence has resulted in the deaths of Somali nationals and the displacement of more than one million people.

<http://travel.state.gov/content/passports/english/alertswarnings/somalia-travel-warning.html>. (Ex. B.)

Ms. Hussein's relationship to her husband and son, her personal history, and the conditions in Somalia make the potential consequences of deportation extraordinarily severe in her case. Because her circumstances are atypical, a downward departure is appropriate. *See United States v. Lopez-Salas*, 266 F.3d 842 (8th Cir. 2001).

VI. ALTERNATIVE PUNISHMENT

In moving for a downward departure, Ms. Hussein does not wish to imply that she does not appreciate seriousness of her actions. She is genuinely remorseful about her participation in the events in question, and understands and accepts that it is the Court's duty to ensure that defendants are appropriately punished for the offenses they commit.

For all of the reasons set forth herein, and in the Position Regarding Sentencing previously filed on Ms. Hussein's behalf, sentencing her to a term of imprisonment of one year or longer would result in punishment that far outweighs the crime committed. But if the Court sentences Ms. Hussein to less than a year, it could fashion a sentence that conditions her release on contributing to the government's efforts to combat terrorism in the U.S. Somali community. As reflected in Ms. Hussein's letters of support from her friends and family, she has established a reputation for mentoring young Somali women, counseling them on the value of education, and otherwise encouraging them to be good citizens. As an alternative to prison, the Court could consider conditioning Ms. Hussein's release on working with the FBI and other government agencies to reach out to Somali youth and speak out against terrorism. She could explain from her own personal

experience how easy it is to be misled and how important it is to avoid getting involved with terrorist organizations. Ms. Hussein's experience and her position—as a young Somali woman, a devout Muslim, and a mentor—makes her uniquely qualified to convey an anti-terrorist message to Somali youth that will be heard. By sentencing her in this way, the Court could ensure that she is adequately punished for her conduct, and yet avoid the devastating consequences of a lengthy sentence in a way that affirmatively benefits the community and promotes U.S. security interests.

CONCLUSION

For all of the foregoing reasons, the Court should grant Ms. Hussein a downward departure based on the collateral consequences arising from her immigration status.

Dated: May 6, 2013

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**ATTORNEYS FOR DEFENDANT
SAYNAB ABDIRASHID HUSSEIN**

EXHIBIT B



Somalia Travel Warning

LAST UPDATED: FEBRUARY 7, 2014

The U.S. Department of State continues to warn U.S. citizens to avoid all travel to Somalia. This replaces the Travel Warning dated June 21, 2013, to update information on security concerns.

There is at this time no U.S. Embassy or other formal U.S. diplomatic presence in Somalia. Consequently, the U.S. government is not in a position to assist or effectively provide services to U.S. citizens in Somalia. In light of this and continuous security threats, the U.S. government recommends that U.S. citizens avoid all travel to Somalia.

The security situation inside Somalia remains unstable and dangerous. Terrorist operatives and armed groups in Somalia have demonstrated their intent to attack Somali authorities, the African Union Mission in Somalia (AMISOM), and other non-military targets. Kidnapping, bombings, murder, illegal roadblocks, banditry, and other violent incidents and threats to U.S. citizens and other foreign nationals can occur in any region of Somalia. In addition, there is a particular threat to foreigners in places where large crowds gather and westerners frequent, including airports, government buildings, and shopping areas. Inter-clan and inter-factional fighting can flare up with little or no warning. This type of violence has resulted in the deaths of Somali nationals and the displacement of more than one million people.

While some parts of south/central Somalia are now under Somali government control with the military support of African Union forces, al-Shabaab has demonstrated the capability to carry out attacks in government-controlled territory with particular emphasis on targeting government facilities, foreign delegations' facilities and movements, and commercial establishments frequented by government officials, foreign nationals, and the Somali diaspora. In February 2012, al-Shabaab announced that it had merged with Al-Qaida. Al-Shabaab-planned assassinations, suicide bombings, and indiscriminate armed attacks in civilian populated areas are frequent in Somalia. On January 1, 2014, al-Shabaab carried out a bombing against a popular hotel in Mogadishu. On September 7 and November 8, 2013, al-Shabaab executed attacks on a popular restaurant and hotel in Mogadishu, killing nearly 30 people and injuring many more, including several government officials and foreign nationals. On July 27, al-Shabaab executed a deadly attack against the Turkish housing compound in Mogadishu. On June 19, Islamist militants carried out a deadly assault on the main UN compound in Mogadishu killing at least 17 people. African Union (AU) soldiers restored order after a 90 minute gun battle. On May 5, an attack on a government convoy carrying foreign diplomats killed eight bystanders. On April 14, a combined suicide bombing/armed assault by al-Shabaab gunmen killed 29 and wounded 58. In addition to larger attacks, assassinations, grenade throwing, and kidnappings remain a daily threat in Mogadishu and elsewhere. In addition to the high profile attacks above, al-Shabaab has claimed responsibility for other terrorist attacks in the region.

Pirates and other criminals have specifically targeted and kidnapped foreigners working in Somalia. In January 2012, a U.S. citizen was kidnapped while on work related travel in Somalia, and in October 2011, a U.S. citizen aid worker living in Somalia was also kidnapped. In both cases, as well as in recent kidnappings of other westerners, the victims took precautionary measures by hiring local security personnel, but those hired to protect them may have played a role in the abductions. A strong familiarity with Somalia and/or extensive prior travel to the region does not reduce travel risk. U.S. citizens contemplating travel to Somalia, including Somaliland and Puntland, are advised to obtain kidnap and recovery insurance, as well as medical evacuation insurance, prior to travel.

Additionally, U.S. citizens are urged to avoid sailing close to the coast of Somalia as attacks have occurred as far as 1,000 nautical miles off the coast in international waters. Merchant vessels, fishing boats, and recreational craft all risk seizure by pirates and having their crews held for ransom in the waters off the Horn of Africa, especially in the international waters near Somalia. Somali pirates captured and killed four U.S. citizens aboard their boat on February 22, 2011. If transit around the Horn of Africa is necessary, it is strongly recommended that vessels travel in convoys, maintain good communications contact at all times, and follow the guidance provided by the Maritime Security Center – Horn of Africa (MSC-HOA). You should consult the Maritime

Administration's Horn of Africa Piracy page for information on maritime advisories, self-protection measures, and naval forces in the region.







U.S. citizens who choose to travel to Somalia despite this Travel Warning are strongly urged to enroll in the Smart Traveler Enrollment Program (STEP) in order to receive the most up-to-date security information and be included in our emergency communication system. Travelers to Somalia should enroll with the U.S. Embassy in Nairobi, Kenya. U.S. citizens traveling by sea to the area of high threat are urged to inform MSC-HOA by emailing POSTMASTER@MSCHOA.ORG, with the subject line 'Yacht Vessel Movement.' The U.S. Embassy in Nairobi is located on United Nations Avenue, Gigiri, Nairobi, Kenya; telephone (254)(20) 363-6000; after-hours emergencies (254)(20) 363-6170. The mailing address is P.O. Box 606 Village Market 00621, Nairobi, Kenya.

U.S. citizens should also consult the Department of State's Country Specific Information for Somalia, the Worldwide Caution, and the International Maritime Piracy Fact Sheet, which are located on the Department of State's website. Travelers may obtain up-to-date information on security conditions by calling 1-888-407-4747 toll-free in the United States and Canada or on a regular toll line at 1-202-501-4444 from other countries. Stay up to date by bookmarking our Bureau of Consular Affairs website, which contains current Travel Warnings and Travel Alerts. Follow us on Twitter and the Bureau of Consular Affairs page on Facebook as well.

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EXHIBIT A

Immigration Courts: Convention Against Torture

In 1999, the Department of Justice implemented regulations regarding the United Nations Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (Convention Against Torture or CAT). Under these regulations, aliens in removal, deportation, or exclusion proceedings may claim that they “more likely than not” will be tortured if removed from the United States. The regulation provides jurisdiction to the immigration courts to hear these claims, and provides jurisdiction to the BIA to hear appeals from the immigration courts’ decisions regarding CAT claims.

There are two forms of protection under the 1999 regulations:

- The regulation established a new form of withholding of removal which is granted to an alien who establishes that he or she would be tortured in the proposed country of removal.
- The second protection concerns aliens who would be tortured in the country of removal, but who are barred from withholding of removal. These aliens may be granted deferral of removal, a form of protection that is more easily and quickly terminated if it becomes possible to remove the alien.

As shown in Table 10 below, the immigration courts adjudicated 29,796 CAT applications during FY 2012. Of those, 643 CAT cases were granted, the majority of which were granted withholding.

Table 10 - FY 2012 Convention Against Torture Cases by Disposition

Granted			Denied	Other	Withdrawn	Abandoned	Total
Withholding	Deferral	Total					
514	129	643	9,710	12,380	6,327	736	29,796

Table 11 on the following page shows a breakdown of CAT completions by immigration courts. The New York City, NY; Los Angeles, CA; San Francisco, CA; Miami, FL; and Orlando, FL, immigration courts combined completed approximately 52 percent of the total FY 2012 CAT cases.