

No. 15-1345

IN THE
Supreme Court of the United States

YUSUF ABDI ALI,

Petitioner,

v.

FARHAN MOHAMOUD TANI WARFAA,

Respondent.

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT**

SUPPLEMENTAL BRIEF FOR PETITIONER

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June 20, 2017

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SUPPLEMENTAL BRIEF FOR PETITIONER

Petitioner files this Supplemental Brief, pursuant to Rule 15.8, in order to call attention to a diplomatic letter from H.E. Hassan Ali Khaire, Prime Minister of Somalia, dated June 19, 2017, layered with an accompanying letter of transmittal, dated today, June 20, 2017, from the Ambassador of the Federal Republic of Somalia to the United States, affirming the position of the Government of Somalia that the alleged conduct for which respondent sued petitioner was undertaken in petitioner's official capacity and requesting that the United States file a suggestion of immunity on the petitioner's behalf. *See* App., *infra*, 1a-8a. This letter was not available at the time of petitioner's last filing¹. The position of the Somali Government affirmed in the Prime Minister's letter was expressed in a letter dated November 23, 2016, from the then-Prime Minister of Somalia to then-Secretary of State Kerry. *See* App., *infra*, 4a-8a.

In the interim between the two letters, the then outgoing President of Somalia sent the Secretary of State a letter dated January 8, 2017, that purported, on behalf of the Government, to seek a waiver of petitioner's immunity. The President of Somalia has no apparent authority to represent the position of his Government on matters of immunity. The President of Somalia enjoys limited responsibilities under the Somali Constitution, and none of those responsibilities can be construed to encompass a request for the grant or waiver of official act

1. This Court's Rule 15.8 permits the filing of a supplemental brief to address an "intervening matter not available at the time of the party's last filing."

immunity.² In any event, the availability of immunity for a foreign official before the courts of the United States should be determined on the basis of the position of the foreign government currently in office, since it is that government that would be embarrassed by the adoption of a contrary position. *See In re Doe*, 860 F.2d 40, 45 (2d Cir. 1988) (“Refusing to give effect to a waiver would not advance that objective in the instant matter; instead, it would serve simply to embarrass the current Philippine government”).

The brief of the Acting Solicitor General expressing the views of the United States in response to an invitation for such views from this Court recommended that the petition be denied, relying on the purported request for waiver of immunity in the interim letter. The Acting Solicitor General argued in his brief that the “court of appeals committed two critical legal errors” in fashioning a rule that “impairs the Executive Branch’s authority and responsibility to make immunity determinations.” Brief for the United States as *Amicus Curiae*, at 12-13. Since, however, petitioner’s immunity appeared to have been waived, and, as a consequence, “correction of the errors in the [court of appeals’] reasoning would not alter its judgment,” the Acting Attorney General counseled a denial of the petition. *Id.* at 23. As he noted, “[t]his Court should not grant review simply to correct the erroneous reasoning of the court of appeals’ decision.” *Id.* In the case *sub judice, au contraire*, the affirmance of petitioner’s

2. See Article 90, Provisional Constitution, adopted August 1, 2012, as reproduced by the United Nations Political Office for Somalia at: https://unpos.unmissions.org/sites/default/files/Adopted_Constitution_ENG_Final%20for%20Printing_19SEPT12.pdf (last accessed June 20, 2017).

entitlement to immunity based on the appended diplomatic letter from the current Somali Government impels a rejection of the reasoning of the court of appeals, requiring alteration of that court's judgment, mandating a dismissal of the case against petitioner.

CONCLUSION

The petition for a writ of *certiorari* should be granted.

Respectfully submitted,
JOSEPH PETER DRENNAN
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June 20, 2017

APPENDIX

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APPENDIX — LETTERS

**EMBASSY OF THE
FEDERAL REPUBLIC OF SOMALIA
WASHINGTON, DC**

NOTE NO. 11-2017

The Embassy of the Federal Republic of Somalia in Washington, D.C., presents its compliments to the Department of State and has the honor to transmit a letter from Prime Minister Hassan Ali Khaire.

The Embassy of Somalia to the United States avails itself of this opportunity to renew to the Department of State, the assurances of its highest consideration.

Washington, DC – June 20, 2017

**Embassy of The Federal Republic
of Somalia in Washington DC**

**Department of State
Washington DC**

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Jamhuuriyadda Federaalka Soomaaliya

Xukuumadda Soomaaliya

Xafiiska Ra'iisul Wasaaraha

(The Government of Federal Republic of Somalia)
Office of the Prime Minister

Ref: OPM/0691/06/2017

Date: 19/06/2017

H.E. Rex Tillerson,
Secretary of State,
United States, Department of State

Excellency,

Allow me to bring to your attention the matter of the civil litigation pending against Mr. Yusuf Abdi All in the United States District Court of Virginia (Alexandria Division), styled as: Farhan Mohamoud Tani Warfaa versus Yusuf Abdi Ali, Civil Action no. 05-701, which litigation is currently the subject of a Petition for a Writ of Certiorari to the Supreme Court of the United States bearing Record No. 15-1464 and a Conditional Cross-Petition for a Writ of Certiorari to the Supreme Court, bearing Record No. 15-1345 (“the Litigation”).

On behalf of the Federal Republic of Somalia, I hereby reaffirm our position as previously stated in the letter by former Prime Minister, H.E Omar Abdirashid Ali Sharmake dated 23rd November 2016 with reference number OPM/0000-942-23/2016, attached.

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It is the hope of the Federal Republic of Somalia
that you will use your good office to facilitate the timely
resolution of the matter.

Excellency, please accept the assurances of my highest
consideration.

Sincerely,

/s/
H.E. Hassan Ali Khaire
Prime Minister
The Federal Republic of Somalia

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Jamhuuriyadda Federaalka Soomaaliya

Xukuumadda Soomaaliya

Xafiiska Ra'iisul Wasaaraha

(The Government of Federal Republic of Somalia)
Office of the Prime Minister

Ref. OPM/0000/942/23/2016

Date:23/11/2016

The Honorable John Forbes Kerry
United States Secretary of State
United States Department of State
2201 "C" Street, Northwest
Washington, District of Columbia 20520
United States of America

Dear Secretary of State Keny:

The Federal Republic of Somalia presents its compliments to the US Department of State. On behalf of the Government of the Federal Republic of Somalia, I, Omar Abdi Rashid Ali Sharmarke, Prime Minister of Somalia, have the distinct honor and high privilege, by this letter, of requesting, urgently, pursuant to the powers vested in me by the Federal Republic of Somalia Provisional Constitution, adopted 1 August 2012, that you use your good offices to obtain immunity for Mr. Yusuf Abdi Ali, a former colonel in the Somali National Army, in the 1980s, in respect of certain civil litigation which is currently pending against him in the United States District Court for the Eastern District of Virginia (Alexandria Division), styled as: *Farhan Mohamoud Tani Waifaa versus Yusuf*

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Abdi Ali, Civil Action No. 05-701, which litigation is currently the subject of a Petition for a Writ of Certiorari to the Supreme Court of the United States, bearing Record No. 15-1464, and a Conditional Cross-Petition for a Writ of Certiorari to the Supreme Court, bearing Record No. 15-1345 (“the Litigation”).

The Litigation was originally filed on 10 November 2004, as Civil Action No. 04-1361, by two individuals, then proceeding anonymously, said to reside in Somalia, who both claimed that they were specifically targeted by Mr. Ali and soldiers acting under his command of the Somali National Army’s Fifth Brigade, in the northern region of Somalia, because of their suspected support of rebel forces, and both allege that they were arrested, detained and tortured. Those claimants took a voluntary dismissal of their subject claims in April of 2005, and recommenced their suit against Mr. Ali, again proceeding anonymously. One of the claimants, identified in the Litigation as “Jane Doe”, dismissed her claims in 2014, and, in that year, the remaining claimant was obliged by the District Court to reveal his identity, namely Farhan Mohamoud Tani Warfaa, who contends in the Litigation, among other things, that he was shot multiple times by Mr. Ali at close range. Mr. Ali vigorously denies such allegations. As previously stated to you by my predecessor, His Excellency, Prime Minister Abdi Farah Shirdon, in an earlier diplomatic letter, dated 30 November 2013, the Government of the Federal Republic of Somalia is of the considered view that the Litigation is injurious to the historic, ongoing process of peace and reconciliation among clans and political factions within Somalia, which

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is being fostered by the Government of Somalia, the United Nations, and other governments, including, not least, the United States, the unfortunate earlier failure of the United States to honor the Government of Somalia's request for immunity for the now deceased former Prime Minister of Somalia, Mohamed Ali Samantar, who was subjected to similar civil litigation in the same District Court, notwithstanding.

I am advised that the Litigation has had a long history in the courts, as adverted to above, dating back to 2004. For most of its duration, the subject proceedings were stayed in order to allow the United States Department of State an opportunity to state its views as to: (1) whether it objects to the action going forward on the ground that Ali should have immunity, and (2) whether fact discovery in Ethiopia would interfere with U.S. foreign policy. Over the decade that followed, upon successive requests from the District Court, the State Department responded, on two occasions, first, on 19 September 2013, and, again, on 24 April 2014, and, in each instance, declined to take an affirmative position on the matter. Thereafter, Mr. Ali moved to dismiss the Amended Complaint, asserting, among other things, that he was entitled to common law "official acts" immunity. The District Court thereafter, per its Order of 25 July 2013, denied Mr. Ali's claims of common law immunity, but also dismissed Mr. Warfaa's claims against Mr. Ali, premised upon the Alien Tort Statute, 28 U.S.C., § 1330, allowing the case to proceed under claims brought under the Torture Victims Protection Act of 1991, 28 U.S.C., § 1330 note. Both parties timely appealed from that ruling, and, on 3 February 2016, the United States Court

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of Appeals for the Fourth Circuit affirmed the rulings of the District Court in all respects.

Mr. Ali then filed a Petition for a Writ of Certiorari with the Supreme Court of the United States on 2 May 2016, seeking review of his claim of common law immunity from suit, and, on 3 June 2016, Mr. Warfaa filed a Conditional Cross-Petition for a Writ of Certiorari, seeking review of the dismissal of his claims against Mr. Ali brought under the Alien Tort Statute. Thereafter, on 3 October 2016, the Supreme Court entered orders inviting the Solicitor General of the United States to file a brief expressing the views of the United States.

As adverted to above, by this letter, the Federal Republic of Somalia hereby affirms and ratifies Mr. Ali's plea of common law immunity from suit, finding that Mr. Ali's acts in question, as Commander of the Fifth Brigade of the Somali National Army, were all undertaken in his official capacity with the Government of Somalia, and would hasten to add that the Federal Republic of Somalia rejects the notion that Mr. Ali's action were contrary to the law of Somalia or the law of nations, much less that he may be fairly said to be liable under any of the theories propounded in the Amended Complaint filed in the District Court. To that end, the Federal Republic of Somalia specifically understands that this designation of immunity for Mr. Ali should come in the form of a Statement of Interest of the United States, to be submitted to the United States Supreme Court, the United States Court of Appeals for the Fourth Circuit, and the District Court, by the Attorney General, or his designee, pursuant to 28

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U.S.C., § 517, and that the Department of State should move with dispatch to take all steps necessary to validate the immunity from suit to which Mr. Ali is entitled, as a former government official of Somalia, and obtain a dismissal of the subject civil proceedings against him.

On behalf of the Federal Republic of Somalia, I wish to stress the critical importance of the instant request, and our deep appreciation of the prompt attention of the Department of State.

Respectfully yours,

/s/

H.E. Omar Abdi Rashid Ali Sharmarke
Prime Minister
Federal Republic of Somalia