Statement of Grover Joseph Rees[1]
before the Committee on Foreign Affairs,
Subcommittee on Africa, Global Health, Global Human Rights, and International Organizations:
Hearing on "The Troubling Case of Meriam Ibrahim",
July 23, 2014

Mr. Chairman and members of the Subcommittee,

Thank you for the opportunity to testify at this timely and important hearing. You have asked me to address the question whether the two children of Meriam Ibrahim and Daniel Wani are United States citizens who should be given appropriate documentation of their citizenship and afforded such protection and assistance as the government of the United States gives its citizens who are residing or visiting in other countries.

Mr. Wani and Mrs. Ibrahim were married in 2011. Mr. Wani was a citizen of the United States at the time of the marriage, having come to the United States in 1988 as a refugee and having subsequently naturalized as a citizen. Since the marriage Mr. Wani has divided his time between his home in New Hampshire, the home he shares with his wife in Sudan, and his family's home in South Sudan. In November 2012 Mrs. Ibrahim gave birth to a son, Martin. The baby's birth certificate, issued by the government of Sudan, lists Mr. Wani as the father. Last month Mrs. Ibrahim gave birth to a daughter, Maya. No birth certificate has yet been issued, perhaps because the birth took place in a prison where Mrs. Ibrahim was being held pursuant to charges related to her allegedly illegal marriage to Mr. Wani.

United States law with respect to the citizenship of children born to United States citizens in other countries is fairly straightforward. Section 301(g) of the Immigration and Nationality Act (INA) provides in pertinent part that a child born outside the United States and its outlying possessions, one of whose parents is a citizen of the United States, is a citizen at birth provided that his or her United States citizen parent resided in the United States for at least five years before the birth, and that at least two of these years of residence were after the parent had reached the age of fourteen.

[1] United States Ambassador, Retired. The witness also served as General Counsel of the United States Immigration and Naturalization Service from 1991 through 1993.

Importantly, Section 309 of the INA provides several additional requirements for establishing the citizenship of children born out of wedlock. Among these requirements is a special evidentiary test: where the United States citizen parent is the father, there must be proof by "clear and convincing evidence" of a "blood relationship" between the child and the putative father. This test does not apply to children whose parents were married at the time of the child's birth.

Because it seems to be undisputed that Mr. Wani was a United States citizen at the times of both children's birth and that he had lived in the United States for at least five years, at least two of which were after he had reached the age of fourteen, it would appear to follow that both children are United States citizens. According to public statements by Mr. Wani, however, the United States has not yet granted his request for certification of Martin's citizenship[2] and has instead requested that he submit additional evidence, including DNA tests, to establish that he is Martin's father.

Some supporters of Mrs. Ibrahim have suggested that the State Department might be implicitly applying Sharia law to the case. If the Department were to accept the contention that the marriage of Martin's parents was invalid under Sudanese law -- because the husband was a Christian and the wife was legally regarded as a Muslim despite her lifelong profession of Christianity -- then it might follow that Mr. Wani would have to meet the "clear and convincing" test to establish a "blood relationship" between himself and Martin.

While I cannot rule out the possibility that this might have been what the consular officer at our Embassy in Khartoum was thinking when he or she requested a DNA test from Mr. Wani, there are at least two other possibilities that seem somewhat more likely. Both of these possibilities are suggested by the sections of the State Department's Foreign Affairs Manual (FAM) that provide guidance to consular officers on how to determine the citizenship of children born abroad. Although these sections are intended to help consular officers correctly apply the relevant provisions of the INA -- and although a careful reading of the FAM sections in their entirety might

[2] Documents indicating the United States citizenship of a child born abroad include a Consular Record of Birth Abroad of a United States Citizen, a Certificate of Citizenship, and a passport. It is not clear from the materials I have reviewed which of these documents Mr. Wani has requested for Martin, or whether he has yet requested one or more of these documents for Maya.

lead to a correct interpretation of the INA provisions -- several key phrases in the FAM language would seem to encourage consular officers to apply the "clear and convincing" test for a "blood relationship", or something very much like it, not only in cases where the child was born out of wedlock but also in cases where the children's parents were married.

The title of 7 FAM 1131.4 is "Blood Relationship Essential." Subsection 1131.4-1(a) explains that the laws regarding "acquisition" of U.S. citizenship through a parent "have always contemplated a blood relationship" and that "[i]t is not enough that the child is presumed to be the issue of the parents' marriage by the laws of the jurisdiction where the child was born." It then states that "the burden of proving a claim to U.S. citizenship, including a blood relationship . . . , is on the person making such claim." Subsection 1131.4-1(b) then correctly explains that the "clear and convincing" test applies only to out-of-wedlock cases and that a "preponderance of the evidence test" applies where the parents were married. In defining the preponderance-of-the-evidence test, however, this subsection sets forth several requirements including that the evidence be "credible and convincing".

Subsection 1131.4-1(c) then sets forth three illustrative situations in which the presumption that a child is the issue of his mother's marriage might not be sufficient and in which the consular officer should therefore "investigate carefully". These situations include when the mother or father was legally married to someone else at the time of the child's conception or birth; when another man is named as the father on the birth certificate; and when there are "[e]vidence or indications that the child was conceived at a time when the alleged father had no physical access to the mother."

Neither Mr. Wani nor Mrs. Ibrahim was married to anyone else at the time of Martin's conception or birth, and Mr. Wani is listed as the child's father on the birth certificate. The public record does not reflect any allegation that Mrs. Ibrahim had a relationship with another man during her marriage. I am informed, however, that the consular officer who requested the DNA test might have done so because he or she had a doubt about whether Mr. Wani and Mrs. Ibrahim had "physical access" to each other during the time period in which Martin was conceived.

If the consular officer's doubts on this point were reasonable and evidence-based – if, for instance, the officer was aware of evidence that Mr.

Wani had not been in Sudan at any time during the period of weeks or months during which Martin might have been conceived – then the officer was duty-bound to investigate carefully. This does not necessarily mean that such careful investigation would require a DNA test. Indeed, 7 FAM 1131.4-1(b)(2) makes clear that even in out-of-wedlock cases "[b]lood tests ***are not required***, but may be submitted and can help resolve cases in which other available evidence is insufficient to establish the relationship." (Emphasis added.) If, however, the consular officer had first given Mr. Wani a reasonable opportunity to provide other evidence that he and Mrs. Ibrahim were together during at least part of the time when Martin could have been conceived, and if he was unable to provide such evidence, then in my view it would not have been inappropriate for the officer to ask Mr. Wani to submit either DNA tests or some other evidence sufficient to resolve whatever doubts were raised by the evidence in the record.

Mr. Wani's public statements, however, suggest that the request for a DNA test might have resulted not from a diligent attempt to apply the law as written. Rather, he says that from the beginning he encountered what seemed to be a generally negative attitude:

> **NE:** What kind of support have you received from the US government?
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> > **DW:** Sadly, it's not the US government, when the problem began the US consul here had a very negative position on this. She was very high handed. (In English) she's very, very rude. She said – and I quote – (in English) " I don't have time." I said (in English) "listen". (Back to Arabic) Because this case is a difficult.
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> -- Interview of Daniel Wani by Nima Elbagir, CNN, May 30, 2014.[3]

This attitude, although far from universal among United States consular and immigration officers, is unfortunately all too familiar to those of us who have worked on immigration and citizenship issues over the years. In my two years as General Counsel of what was then the U.S. Immigration and Naturalization Service I worked with many conscientious officers, but we all struggled with what often seemed to be an institutional culture of

[3] Full transcript is available at http://cnnpressroom.blogs.cnn.com/2014/05/30/cnns-nima-elbagir-talks-to-husband-of-sudanese-woman-sentenced-to-death-for-christian-beliefs/

negativity and denial. I used to say that we should either change our attitude or change the sign on the building to "Anti-Immigration and Naturalization Service." In subsequent years, when I worked with this Committee and then within the State Department itself, I learned that the culture of denial was perhaps even more robust within the consular service than within INS.

Let me reiterate that this widespread skepticism does not come about because consular officers are bad people. On the contrary, most are decent and conscientious. Our consular officers are indeed sometimes confronted with frivolous and/or fraudulent applications. "Once bitten, twice shy" is a natural human tendency, and people who have been bitten three or four times are likely to be shy forever. Moreover, many officers spend most of their time dealing with nonimmigrant visa applications, where the law explicitly requires the officer to be skeptical: every applicant for a nonimmigrant visa is assumed to be an intending immigrant – that is, he or she is assumed to be lying – until the applicant presents evidence sufficient to convince the officer that he or she will really leave the United States in accordance with the terms of the visa.[4] Unfortunately, some officers carry this extreme skepticism over to areas where the law does not prescribe it, including the provision of documentation and other consular services to United States citizens.

This tendency to apply factual and legal tests that are stricter and more burdensome than those required by law may be exacerbated in citizenship cases by some of the FAM language I have cited above. The FAM speaks of children born abroad "acquiring" citizenship from their United States citizen parents, although the statute makes clear that such a child, just like a child born in United States, "is" a citizen at birth. This "acquisition" language matters because it may reinforce the tendency of some consular officers to regard the child as an "applicant" for citizenship and the granting or denial of the application as a matter within the officer's own discretion. The FAM's importation of the "blood relationship" language from the out-of-wedlock context, and its statement that the preponderance of the evidence test can only be met by evidence that is "credible and convincing", may further encourage consular officers – particularly the majority of such officers who are not lawyers – to insist on DNA tests and other burdensome

[4] INA sec. 214(b): "Every alien shall be presumed to be an immigrant until he establishes to the satisfaction of the consular officer, at the time of application for admission, that he is entitled to a nonimmigrant status..."

evidentiary requirements not only in extraordinary cases but as a matter of routine.

Unlike the granting of a visa, however, the issuance of citizenship documents is not a discretionary act: rather, it is ministerial and recognitive. Denying a visa to an applicant who is eligible for such a visa may be bad policy, but refusing to recognize the citizenship of someone who is in fact a United States citizen is against the law.

Aside from complying with the law, it is important that all representatives of the United States act consistently with our values. If the consular officer did indeed react as Mr. Wani says she did to his pleas on behalf of his children – and also on behalf of his wife, who is eligible for immediate permanent residency in the United States and whose situation should in any event make us want to help her in whatever way we can -- then this conduct was squarely at odds with these values.

I am, however, proud that our government has begun to make amends in recent weeks by paying careful attention to the situation of Mrs. Ibrahim and her family and affording them all appropriate assistance and protection. It is good to know that institutional concerns can be trumped from time to time by first principles – in this case the principle that we Americans do not leave our own in harm's way.