



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: AA/10850/2012

THE IMMIGRATION ACTS

Heard at Belfast
On 26 June 2015

Decision & Reasons Promulgated
On 28 September 2015

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

MR ESSA ABDI MUSE

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S McTaggart, Counsel instructed by RP Crawford & Co
Solicitors

For the Respondent: Mr M Mathews, Home Office Presenting Officer

DETERMINATION AND REASONS

1. This appeal comes back before the Upper Tribunal following a hearing on 28 March 2014 before the President of the Upper Tribunal, whereby the decision of the First-tier Tribunal dismissing the appellant's appeal against a removal decision, was set aside for error of law. The error of law decision is set out in full as follows:

"DETERMINATION AND REASONS

1. This appeal originates in a decision made on behalf of the Secretary of State for the Home Department (*'the Secretary of State'*) on 16th November 2012 whereby the Appellant's application for refugee status was refused. The Appellant is a national of Somalia, aged 29 years. He was also refused humanitarian protection under Article 15(c) of the Qualification Directive. Similarly, his claims under Articles 2, 3 and 8 ECHR were rejected. Finally, discretionary leave to remain in

the United Kingdom was refused. This was followed by a decision to remove the Appellant from the United Kingdom. In substance, the Appellant's applications for protection were based on his claim that the 'Al-Shabab' organisation would kill him in the event of having to return to Somalia.

THE IMPUGNED DECISION

2. The ensuing appeal to the First-Tier Tribunal (*the FTT*) was unsuccessful. The decision of the FTT may be analysed in the following way:
 - (a) The Judge identified various features of the Appellant's story which cast doubt on his claim that he had left Somalia in September 2012.
 - (b) It was considered that the Appellant's failure to mention in interview the alleged death of his uncle undermined the credibility of his later account that his uncle was killed by Al-Shabab.
 - (c) The Appellant's account of events on the day when he left Kismayo, Somalia suffered from various inconsistencies, undermining still further the credibility of his account.
 - (d) His claim that he took his uncle's 'cemetery records book' from Kismayo but then handed this to an agent before boarding the plane in Mogadisu was considered unworthy of belief.
 - (e) (By implication) the Appellant's credibility was shaken still further by his failure to contact his wife and mother after leaving Kismayo.
 - (f) He gave contradictory accounts of his stay with the Imam in Mogadishu.
 - (g) His ability to travel from Kismayo to Mogadishu, to remain in Mogadishu for a period and then to travel to the airport and leave the country undermined the risk asserted by him.
 - (h) His claim that he is at risk in Somalia on account of his illegitimacy was undermined by his other evidence that he is married, was working in a cemetery and also sold cigarettes.

These factors gave rise to the Judge's omnibus conclusion that the Appellant's credibility was damaged. The Judge further rejected the Appellant's claims that he has family members who belong to the Ashraf clan and that his uncle was killed as alleged in the various respects outlined above.

THE FTT DETERMINATION

3. The Judge then considered the question of risk upon return to Mogadishu in greater detail. This exercise included an examination of the decision of the Upper Tribunal in AMM and Others (Conflict; Humanitarian Crisis; Returnees; FGM) Somalia CG [2011] UKUT 00445 (IAC). Having done so, she reasoned and concluded as follows:

'The Appellant is not returning to Mogadishu after a significant time abroad. There is no evidence that he is vulnerable. He therefore comes within paragraph [2] (of AMM) and is someone who would not face a real risk of Article 3 harm as he is fit for work and has family connections in Kismayo and has previously been able to seek the help of an Imam in Mogadishu. Even if he is unable to return to Kismayo, which I do not accept, he could remain in Mogadishu.'

The Judge's overall conclusion was that the Appellant had not demonstrated a well founded fear of persecution, thereby impelling to a dismissal of his asylum appeal. The Judge also dismissed the appeals on humanitarian protection and ECHR grounds.

APPEAL TO THIS TRIBUNAL

4. The grant of permission to appeal to this Tribunal is couched in terms that the FtT Judge did not adequately deal with the risk to which the Appellant would be exposed on return to Somalia, particularly in Mogadishu, in journeying therefrom to Kismayo and in Kismayo, given the 'current conditions'. The permission Judge noted the FtT Judge's findings that the Appellant is not vulnerable and could remain in Mogadishu. He considered it arguable that the Judge did not properly engage with these issues. Permission to challenge the Judge's adverse credibility findings was also granted, without elaboration.
5. Notably, the 'headline' in the Grounds of Appeal is a criticism of the FTT Judge's assessment of the Appellant's credibility:

'The appellant would submit that the decision shows material errors of law in regard to the assessment of credibility in the case.'

Attention is then directed to the decision of the English Court of Appeal in Karanakran - v - SSHD [2000] EWCA Civ 11, which enjoined Tribunals to concentrate on the 'ultimate question' of:

'Whether there is a real risk of serious harm in the country of origin.'

The Grounds proceed to criticise the FTT determination in the following respects:

- (a) No reason is given for the suggestion that the Appellant should have been aware that Al-Shabab withdrew on the day he departed from Somalia.
- (b) The Judge's adverse credibility assessment of the Appellant for his failure to mention his uncle's death during the screening interview is undermined by the fact that the Appellant did so both in the substantive asylum interview and again in his statement.
- (c) The Judge erred in suggesting that the Appellant's wife would not have been free to go to tell him of the uncle's death in its aftermath.
- (d) The Judge was wrong in considering that a series of events described by the Appellant could not have unfolded within the limited time frame of 30 minutes.

- (e) The Judge failed to recognise that agents typically order their 'clients' to leave everything behind.
- (f) In finding the Appellant's claim that he had no means of contacting a relative who assisted him not credible, the Judge provides no reason '*with reference to objective evidence*'.
- (g) The Judge should have found that the Appellant's internal travel movements **were** the product of good fortune.
- (h) The Judge was wrong to reject the Appellant's claims that some members of his family belonged to the Ashraf clan, that his uncle was killed as alleged and that Al Shabab were looking for him.
- (i) The Judge failed to correctly apply the AMM test of whether conditions in Kismayo – were the fact of a transitional government is acknowledged – are '*sufficiently durable*' to allay concerns about the Appellant's safety upon returning there.
- (j) The Judge further erred in failing to consider, properly or at all, whether a person with the Appellant's characteristics viz someone who has been absent from Somalia for a significant period could safely return to Mogadishu.

CONSIDERATION AND CONCLUSIONS

6. At the outset of the hearing, I raised with Mr McTaggart (of Counsel), representing the Appellant, the issue of the grant of permission to appeal against the Judge's adverse credibility findings. I observed that the permission Judge had not identified any arguable error of law in this respect. I suggested to Counsel that, taking into account the relevant threshold, namely irrationality, this aspect of the appeal presented a substantial challenge for the Appellant. It seemed to me that this element of the grant of permission exhibited little enthusiasm on the part of the permission Judge. Bearing in mind the evidence considered, coupled with the consideration that the Judge had had the opportunity of considering the Appellant's evidence at first hand, it seemed to me unlikely that any of the Judge's adverse credibility findings would be upset on the ground of irrationality. While Mr McTaggart did not concede this, he was inclined to recognise the force of these observations.
7. As noted above, the central pillar of the grant of permission to appeal was the adequacy of the Judge's treatment of the AMM decision and its application to the Appellant's circumstances. I considered, provisionally, that the terms in which permission was granted were, considering the Determination as a whole, as one must, a little harsh. The outcome of the contest on this, the core, issue was by no means preordained. However, echoing the terms of the grant of permission, Mrs O'Brien, on behalf of the Secretary of State, signalled a concession on this issue, based on paragraphs 26 – 29 of the Determination. This concession, very properly, did not extend to the adverse credibility findings.

DECISION AND DIRECTIONS

8. Reflecting the above, at the hearing I decided and directed as follows:
 - (i) The decision of the FtT is set aside.
 - (ii) I retain the case in the forum of the Upper Tribunal for the purpose of remaking the decision.
 - (iii) The further hearing will postdate the promulgation of the decision of the Upper Tribunal in MOJ and Others - v - Secretary of State for the Home Department, which has the potential to be designated an updated Somalia Country Guidance decision.
 - (iv) Following promulgation of the decision in MOJ and Others, the file should be brought to my immediate attention for the purpose of making any desirable further directions.
 - (v) Any further hearing will be relisted before me, subject to availability.
9. I add the footnote that, as the decision in MOJ and Others will make clear, there is a substantial body of country evidence relating to Somalia some of which was not considered by the Secretary of State in making the impugned decision in the present case and much of which was not brought to the attention of the FtT Judge."

2. Although the grounds of appeal before the First-tier Tribunal included a challenge to the First-tier Judge's credibility findings, that challenge was no longer pursued.

The oral evidence

3. In examination-in-chief the appellant adopted his witness statement dated 22 June 2014. In cross-examination he confirmed that he is originally from Kismayo which is in the lower Juba region of Somalia.
4. When he left Kismayo, his mother had by then passed away but his wife was there. However, now she has left. His mother passed away in July 2014. Although he did not say that in his witness statement, this is not something he was asked but he did tell his solicitor. It is true that his mother dying is a very important event for him.
5. He last made contact with his wife in 2014 but he does not remember the date exactly. It was at the same time as his mother passed away, about July 2014. That was not the only occasion on which he was able to speak to her, he had been communicating with her for a while, since about December (2013).
6. The last time he spoke to his wife she said that she intended to leave Kismayo for Mogadishu and that she would go to an IDP camp in Mogadishu. Life was very difficult in Kismayo and the only person she had there was the appellant's mother, who had died.

7. He had heard that the judge who first heard his appeal (at the First-tier Tribunal) did not believe that his uncle had died. He did not have any other family in Kismayo, apart from his mother, who also died.
8. His cousin in Saudi Arabia was deported from there in July 2014. As to whether it is just a coincidence that all these events happened in 2014: his wife leaving, his mother dying and his cousin being deported from Saudi Arabia, the appellant said that he has no control over the things that happened.
9. He had attempted to use the Red Cross to try and trace his wife. As to whether he had considered getting the Red Cross to confirm that matter, when he went there he filled in a form and they said that they would send a letter but so far he has not received it. He had filled in a form with all the details of his family in February of this year (2015).
10. He had heard of the programme whereby the Home Office help people to go back to their own countries with financial assistance and help them to obtain employment. He then said that he had heard about those possibilities but he did not know about support. He remembers being given a piece of paper when reporting to the Home Office but he did not understand what it was all about.
11. As to why he does not now want to go back to Mogadishu with assistance from the Home Office, the appellant said that he did not come to the UK for economic reasons but for protection and to save his life.
12. He had told the truth to the previous judge and was telling the truth today. He was targeted by Al-Shabaab and is from a minority tribe and would therefore have no protection if he went back to Somalia. He would not be able to protect himself and his wife, not being from a strong tribe and he has no skills or a profession which would allow him to survive. The "economic boom" belongs to majority tribes and the uneducated are given the low-paid jobs. There would be nothing for him. Since the Somalian government collapsed all business is that way. At the moment he knows that in Mogadishu there is an African peacekeeping force and that it is a war zone, with fighting all the time.

Submissions

13. On behalf of the respondent Mr Mathews submitted that the First-tier Judge had found the appellant to be lacking in credibility and those findings are preserved. The First-tier Judge did note that the respondent did not accept that the appellant was illegitimate, although the First-tier Judge made no finding about that. She did however find that the appellant had not given a credible account of his mother and uncle being Ashraf or that his uncle was killed by Al-Shabaab, or that Al-Shabaab were looking for the appellant.
14. Despite there being no express finding about whether or not the appellant is illegitimate, the judge was still not satisfied that the appellant was from a minority clan. There was no finding as to what clan he belonged to. That therefore, leaves open the conclusion that he is from a majority clan. It is improbable that he would

say that he was from the minority Ashraf, but was in reality from another minority clan.

15. His claim was made at a time when there would be some benefit to a claim to be from a minority clan but the decision in *MOJ & Ors (Return to Mogadishu) (CG) [2014] UKUT 442 (IAC)* means that the benefit of being from a minority clan is considerably diminished.
16. The First-tier Judge was not completely convinced that the appellant was in Kismayo at the time when he said he was there since his knowledge of events at that time was not convincing.
17. In the evidence at this hearing, the appellant was clear that he had his mother and wife there, and the finding of the First-tier Tribunal is to the effect that it can be assumed that his uncle was also there. It is surprising that he had said that his mother had passed away but he had omitted that from his witness statement. That could not be explained away just on the basis that he was not asked about it.
18. Contact with his wife was re-established on or around July 2014 and no doubt that evidence would be linked in his mind to the death of his mother. That is said by the appellant to be at the very same time that his wife went to an IDP camp in Mogadishu, and the very same month that his cousin, who paid a considerable sum to get him to the UK, was deported from Saudi Arabia.
19. Those claims seem to indicate a contrived case to make his claim consistent with country guidance.
20. Despite what the appellant said about efforts to contact his wife through the Red Cross, that is information that could very easily have been confirmed with the Red Cross.
21. As to clan membership, the appellant is not able to establish that he would not have the assistance of a majority clan, and the burden of proof is on him.
22. According to *MOJ* there would be no risk to the appellant of a breach of his Article 3 rights from Al-Shabaab, and he would not be able to establish an Article 15(c) breach either. The appellant does not have any particular characteristics that would create a risk for him more than for anyone else. The argument for the appellant seems to boil down to an Article 3 risk in terms of his being required to live in an IDP camp or where conditions on return would breach Article 3. However, not everyone outside Mogadishu is in an IDP camp. At [424] - [425] of *MOJ* it was concluded that that it is not simply those from Mogadishu who may return there without an Article 3 or Article 15(c) risk. Someone returning there with access to funds and a social support network or in receipt of remittances, would not be at risk.
23. Furthermore, *MOJ* refers at [344] - [352] to the economic boom and inward investment. That is in terms of hotels, restaurants, taxis, bus services, construction and so forth. None of those require particular skills and there is nothing to indicate that the appellant would be excluded from obtaining such employment.

24. Furthermore, at [351] it is suggested that people from the West may have advantages in seeking employment.
25. Clan membership is less significant in Mogadishu. Although it has some relevance it is not determinative. As explained in *MOJ*, there is assistance of up to £1,500 available. The appellant previously had financial assistance from a relative in Saudi Arabia although conveniently that cousin has now been deported and he says is unable to provide such assistance.
26. There is no reason to believe that the appellant would have to go to an IDP camp. He is young and fit and more than capable of finding employment. He has not established that he has no clan affiliation from whom he could obtain assistance.
27. Mr McTaggart accepted that the First-tier Judge did not accept that the appellant had links to the Ashraf through family members, although there was no finding as to his illegitimacy. It was an impermissible leap to say that he is therefore a member of a majority clan and would have support.
28. It is true that a finding on illegitimacy does not rule out membership of a majority clan, but the fact still remains that there is no finding on what clan the appellant is from.
29. As to the meaning of 'illegitimate', it is to the effect that he is not officially from one clan or another.
30. The appellant's claim is that his mother was raped and that she was from the Ashraf.
31. As the report dated November 2014 from the Office for the Coordination of Humanitarian Affairs ("OCHA") states at page 14 of the appellant's bundle, "Over 40,000 Somalis were deported from Saudi Arabia in the last year as part of a crackdown on illegal immigrants." That supports what the appellant says about his cousin having been deported from Saudi Arabia.
32. The appellant is not from Mogadishu and has no established presence there, only having been there for a short period of time. It is not known whether the imam who helped him is still there. These are factors set out in *MOJ* as being relevant. The appellant says that he has no other family or friends there and no clan support.
33. He had previously been in employment as a grave digger and selling cigarettes. Although packages of support are available, these are for assisted voluntary returns, which is not what the appellant is. His evidence is that his cousin is no longer in Saudi Arabia and is not therefore in a position to send him any money. In the UK he only has NASS support.
34. Last December was the last contact he had with his wife. He would not be able therefore, to take advantage of the so-called economic boom.
35. The OCHA report at page 1 suggests that the situation has deteriorated since the decision in *MOJ*. There is reference at page 2 to clan discrimination and violence.

36. The Country Information and Guidance from the Home Office dated March 2015 ("CIG") refers at 1.3.1 to there being no effective protection from the State. I was referred to 2.2.5 of the same report, being an extract from a report from Amnesty International dated October 2013.
37. Mr McTaggart also referred me to 2.5.16 – 2.5.22 in terms of the situation for IDPs. It was submitted that if the appellant is returned to Mogadishu he would have no option but to go to an IDP camp where he would face an Article 3 risk.

My conclusions

38. The First-tier judge found, in effect, that the appellant's account was devoid of credibility. Aside from what appears at [2] of the error of law decision in terms of the summary of findings made by the First-tier Judge, it is also important to note that it was concluded at [19] that it was not credible that the appellant has no means of contacting his cousin in Saudi Arabia who is said to have funded his journey from Somalia. At [24] the First-tier judge said that she did not accept that the appellant was at risk in Somalia because of his illegitimacy or that he is unable to support himself and his family there. At [25] the claim that his uncle was killed "as claimed" was rejected. At [27] it was concluded that the appellant has family in Kismayo and would be able to work. Lastly, at [29] the conclusion was that there was no evidence that the appellant was vulnerable, he is fit for work and has family connections in Kismayo.
39. Those findings in relation to the appellant's credibility put into context the appellant's claim that his mother has died, that his wife has left Kismayo and lives in an IDP camp outside Mogadishu and that his cousin in Saudi Arabia has been deported to Somalia. In his most recent witness statement the appellant says that she has fled to Kenya for safety and is still there, and has no money to help him.
40. I bear in mind the background material drawn to my attention on behalf of the appellant in terms of deportations of Somalis from Saudi Arabia in 2014. Nevertheless, I am satisfied that there is merit in the submissions made on behalf of the respondent in terms of the credibility of the latest evidence from the appellant. He claims that his mother died in July 2014. However, his latest witness statement is dated 22 June 2015 and in it he says nothing about his mother having died. That alone in my view undermines the credibility of that aspect of his claim. The lack of credibility is reinforced by his evidence that his mother died at about the same time as the last time he made contact with his wife. In addition, this was also at about the same time, indeed the same month according to his witness statement, that his cousin was deported from Saudi Arabia. The last contact he had with his wife, and his cousin's deportation from Saudi Arabia, if true, would both have been reference points for his evidence which would have reminded him, if he needed reminding, that his mother had also died at about the same time.
41. The appellant says that he contacted the Red Cross in order to see if they could trace his wife. However, despite apparently having gone to the Red Cross and completed a form, there is no evidence from the Red Cross to support his contention that he

ever went there. This is evidence that in my judgement it is reasonable to believe he could have obtained.

42. I entirely accept that events such as the appellant's wife leaving her home area and going to an IDP camp, his mother passing away and his cousin being deported from Saudi Arabia, are all events which individually are inherently plausible. It is well known that there are IDP camps in Somalia and, as I have indicated, background material shows that there were deportations from Saudi Arabia in 2014. However, I am not satisfied that the appellant has given a credible account of any of these specific events having occurred, bearing in mind the matters relating to the appellant's credibility on those issues set out above, and taking into account his lack of credibility to date, as found by the First-tier Tribunal.
43. Thus, I am not satisfied that the appellant has given a credible account of his wife having left her home area of Kismayo, of any cousin having been deported from Saudi Arabia or of his mother having died. Even if the appellant did go to the Red Cross and complete an application form in relation to a claimed intention to search for his wife, I do not accept that this was done by the appellant because he actually needs their assistance to contact her. In any event, on the basis of the information before me, I am not satisfied that he has sought the assistance of the Red Cross.
44. On behalf of the appellant what is said to be his 'illegitimacy' is relied on. That is to say, his mother was not married to his father, she having been raped.
45. In his first witness statement the appellant claimed that he would be at risk on return to Somalia in part because he is an illegitimate child with no clan and no-one to protect him, which would make him vulnerable. It was not suggested on behalf of either party that a finding has already been made by the First-tier Judge in relation to the appellant's claim that he is illegitimate. It seems to me that the First-tier Judge's findings at [24] and [25] can be read either way on this issue.
46. In any event, the appellant's account in my judgement is so lacking in credibility that I am not satisfied that he has established that it is reasonably likely that he is illegitimate. Even if he is, on the basis of the findings made by the First-tier Tribunal, that has not disadvantaged him in the past. He was able to find employment, get married and was able to arrange to leave the country and come to the UK.
47. The First-tier Judge was not satisfied that the appellant has family members who are from the Ashraf. There was in fact no finding as to what clan affiliation he has. Mr McTaggart submitted that it was not necessarily the case that just because he was found not to be associated with a minority clan, the Ashraf, he must therefore be from a majority clan. This submission has some superficial attraction but there is, it seems to me, force in the submission made by Mr Mathews to the effect that it is not credible that the appellant would falsely assert he was from one minority clan, the Ashraf, only to conceal that he was in fact from another, different, minority clan. Logically, the concealment must relate to his being a member of a majority clan.
48. On the facts of this appeal, that in my judgement is the true position. The appellant's overall lack of credibility, and the preserved finding that he had not established that

he is from the minority Ashraf clan, leads to the conclusion that he is in fact associated with one of the majority clans. It is not possible to determine which clan that is, but that is not a finding that needs to be made.

49. I do not accept therefore, that on return the appellant would be without clan associations which would mean that he would be hampered in terms of any support that he might be able to obtain, for example in obtaining employment. In any event, for the reasons I have given, it is reasonably likely that the appellant has family members in Somalia, being connections which would help him to re-establish himself in Mogadishu, even if he were not able because of the security situation to travel to Kismayo.
50. I was not referred to any evidence in terms of what difficulties there may be in the appellant returning to his home area of Kismayo. I am prepared to accept however, that the security situation outside Mogadishu is such that he may be at risk of harm in travelling there. However, taking into account all the matters set out in *MOJ* at [407] in terms of an individual's return to Mogadishu, and with specific reference to the appellant, I am not satisfied that he has established that he would be at risk for any reason, or that he would be required to live in an IDP camp.
51. Although it was submitted on behalf of the appellant that with reference to the information in the OCHA report, for example at page 1, the situation has deteriorated since the guidance provided in *MOJ*, that report is dated November 2014, just two months after the last date of hearing, and promulgation of *MOJ*. I do not consider that that report affects in any way the guidance in *MOJ*, when set against the considerable volume of background material considered in *MOJ*, and bearing in mind the date of the report.
52. The appellant has not established that he would not be able to access the economic opportunities available in Mogadishu. He would be able to support himself and to live in relative safety, as he did before he came to the UK, when he was living in Kismayo.
53. I am not satisfied that the appellant has established to the required standard that he has a well-founded fear of persecution for a Convention reason or that he faces a real risk of a breach of his Article 3 rights on return to Somalia.
54. It was accepted on behalf of the appellant that in the light of *MOJ*, there is no scope for argument as to a risk of harm with reference to Article 15(c) of the Qualification Directive.

Decision

55. The decision of the First-tier Tribunal involved the making of an error on a point of law. That decision having been set aside, I re-make the decision by dismissing the appeal on asylum grounds and with reference to Article 3 of the ECHR.