Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: AA/06003/2014**

THE IMMIGRATION ACTS

Heard at Columbus House, Newport **Decision & Reasons Promulgated**
On 29 July 2015 **On 28 September 2015**

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL ARCHER

Between

BN
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Grace Capel, Counsel, instructed by Migrant Legal Project
For the Respondent: Mr Irwin Richards, Senior Home Office Presenting Officer

DECISION AND REASONS

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) I make an order prohibiting the disclosure or publication of any matter likely to lead members of the public to identify the appellant. Breach of this order can be punished as a contempt of court. I make the order because the appellant is an asylum seeker who might be at risk just by reason of being identified.

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2. The appellant appeals against the decision of the First-tier Tribunal dismissing the appellant's appeal on asylum and human rights grounds against a decision taken on 26 February 2014 refusing to grant her further leave to remain and to remove her to Somalia.

Introduction

3. The appellant is a citizen of Somalia born in 1943. She arrived in the UK on 15 January 2014 having left Somalia the previous day. She claimed asylum on arrival on the basis that she was a member of the Ashraf minority clan and subject to persecution by Al-Shabab on return. She was 72 years old and a widow. She came to the UK because there was no one to look after her and there was fighting in her area. She lived in Jingadda in the Huraan area of central Somalia.

4. The appellant stated that she has three children, one lives in Somalia or the USA, one lives in the USA and a daughter lives in the UK. She has hearing problems, problems with her memory and problems understanding questions in interview. The respondent relied upon a Sprakab language analysis test and rejected the appellant's claim to be from central Somalia and a member of a minority clan. Her claim to be a lone woman in Somalia was also rejected. She did not otherwise qualify for leave to remain.

The Appeal

5. The appellant appealed to the First-tier Tribunal. She did not attend the hearing listed at Columbus House on 4 February 2015 and her then representatives withdrew on 8 October 2014. The hearing was relisted for 2 March 2015 at Columbus House. The appellant did not attend again and the respondent was not represented. The judge determined the appeal without a hearing.

6. The judge found that the appellant was an unreliable witness and relied upon the Sprakab evidence which assessed the appellant's linguistic background as the region of Bari in north-east Somalia. She was unable to say which clan she belonged to when asked by the Sprakab analyst. Even if she was a member of a minority clan she had not been persecuted during her 70 years for being a member of that clan. There is a presence of Al-Shabab in the Bari region but the background evidence and the appellant's personal history did not demonstrate such a high level of indiscriminate violence to justify a grant of humanitarian protection.

7. The judge dismissed the appeal on all grounds in a decision dated 2 March 2015.

The Appeal to the Upper Tribunal

8. The appellant sought permission to appeal on 11 April 2015. The grounds assert that the appellant is virtually blind, unable to walk unaided and is illiterate. She instructed her current representatives on 9 April 2015 at a Bristol Refugee Rights drop-in. She was accompanied by her daughter, AO,

who was granted refugee status in the UK on 17 February 2004. The respondent had failed to disclose that evidence. The appellant was unable to exercise her right of appeal unaided. It was not in the interests of justice to proceed with the hearing in absence.

9. Permission to appeal was granted by First-tier Tribunal Judge Chambers on 23 April 2015 on the basis that it was arguable that an error of law had arisen as a result of non-provision of the information relating to AO. All grounds were arguable.

10. In a rule 24 response dated 6 May 2015, the respondent sought to uphold the judge's decision on the basis that it was not clear on what basis AO has leave to remain in the UK and it could not be said with any degree of certainty that, if any material was withheld, that would have made any difference to the outcome of the appeal.

11. I have seen a bundle of papers relating to AO's asylum claim from 2002. Mr Irwin had no objection to admissibility of those documents.

12. Thus, the appeal came before me.

Discussion

13. Ms Capel submitted that it was not clear who asked the judge to determine the appeal on the papers. AO was granted refugee status as a member of a minority clan but that was not mentioned in the appellant's refusal letter. AO's evidence refers to the appellant as being involved in incidents. There are supporting witness statements as well. The respondent should have considered the grant and basis of grant of refugee status to AO in the refusal letter. The evidence is capable of undermining the respondent's case. A mistake of fact has given rise to unfairness. The duty of candour applies with full force in the context of asylum appeals. There is an obligation on the respondent to take reasonable steps to ensure that material is placed before the Tribunal. Constructive knowledge is enough. There is clear evidence that the appellant is a victim of persecution and the credibility findings cannot be sustained. The decision was taken in absence of an important fact and that is a material error of law. There was no burden on the appellant to act on an unknown fairness.

14. Mr Richards submitted that there was no unfairness. Any suggestion that the respondent had withheld evidence was entirely rejected. There is nothing on the file of any knowledge of the basis of leave to AO. A check on the database comes to the same conclusion. The appellant has failed to explain why the evidence now submitted was not before the judge and it is not determinative of the issue in any event. Refugee status might have been granted in error; there is no evidence that AO was ever subject to a language test. The judge only had a duty to consider the evidence before him and gave sound reasons. Membership of a minority clan is no longer determinative of refugee status. The determination should stand.

15. I asked Ms Capel how the respondent could have known that AO was a recognised refugee. Ms Capel submitted that the scope of the duty of

candour is that the respondent should have made enquiries about family members named in the screening interview. It would have been reasonable for those enquiries to be made because AO was an immediate family member. There was no suggestion that information had been concealed but the duty of candour required checks to be made. In any event, the decision was made in the absence of a highly relevant fact and that is a material error of law. Membership of a minority clan is still an important factor.

16. I am not persuaded that the duty of candour on the respondent extends to checking the refugee status of immediate family members named by the appellant during the screening interview. The case law cited does not support that submission. There is nothing to suggest that such checks would have revealed the basis of the grant of refugee status to AO in any event. I do not find any fault on the part of the respondent or the judge. I find that the judge considered the position under the procedure rules and concluded that it was in the interests of justice to determine the appeal without a hearing. If there is any fault in this appeal it must lie with the former representatives who failed to submit obviously relevant material to inform the respondent's decision or at least to invite the respondent to reconsider the decision.

17. I find that the appellant has not had a fair hearing. The judge was not able to consider highly relevant evidence which goes to the heart of the appellant's claim. The witness statement prepared by AO for her 15 January 2004 appeal hearing states that AO is a member of the Asharaf-Hasan clan, a Benadiri sub-clan. She lived in the Horseed district of Jowhar with her parents. Her father was shot by a group of militiamen in 1991 and the family were attacked many times by different groups of militiamen. AO was abducted and repeatedly raped in 1994. AO fled Somalia in 2002 because she feared repeat abduction. The respondent decided to grant AO indefinite leave to remain refugee status just prior to the 15 January 2004 appeal hearing; presumably on the basis of the evidence now submitted to the Upper Tribunal.

18. All of that material presents a wholly different picture from the evidence considered by the judge in the First-tier. I have considered the case law submitted by Ms Capel. I find that there is force in her alternative submission that the decision was made in the absence of a highly relevant fact and I have considered MM (unfairness; E & R) Sudan [2014] UKUT 00105 (IAC). Paragraphs 15-22 are relevant. The judge's conduct of the hearing of this appeal in the First-tier was beyond reproach. However, there was unfairness due to the ignorance of an established and material fact, namely the existence and basis of a previous grant of refugee status to AO. I accept that there is some strength in Mr Richards' submission that the appellant or her advisors were responsible for the mistake but having regard to the obvious vulnerability of the appellant, I am satisfied that this is a case where some flexibility in the application of Ladd v Marshall principles is required. The criterion to be applied is fairness. The error of fact has resulted in significant unfairness and that is a material error of law.

19. Thus, the First-tier Tribunal’s decision to dismiss the appellant’s appeal involved the making of an error of law and its decision cannot stand.

Decision

20. Both representatives invited me to order a rehearing in the First-tier Tribunal if I set aside the judge’s decision. Bearing in mind paragraph 7.2 of the *Senior President’s Practice Statements* I consider that an appropriate course of action. I find that the errors of law infect the decision as a whole and therefore the re-hearing will be de novo with all issues to be considered again by the First-tier Tribunal.

21. Consequently, I set aside the decision of the First-tier Tribunal. I order the appeal to be heard again in the First-Tier Tribunal to be determined de novo by a judge other than the previous First-tier judge.

Signed Date 25 September 2015

Judge Archer

Deputy Judge of the Upper Tribunal