



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: DA/00798/2014

THE IMMIGRATION ACTS

Heard at Nottingham Magistrates' Court **Decision & Reasons Promulgated**
On 11 February 2015 **On 16 March 2015**

Before

UPPER TRIBUNAL JUDGE DAWSON

Between

I N
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms G Capel, instructed by Duncan Lewis & Co Solicitors

For the Respondent: Mr G Harrison, Senior Presenting Officer

DECISION AND REASONS

1. The appellant who is a national of Somalia has been granted permission to appeal the decision of First-tier Tribunal Judge I F Taylor and Mr G Getlevog (the panel) by Designated First-tier Tribunal Judge Macdonald. The panel dismissed the appeal against the decision that s.32 (5) of the UK Borders Act 2007 applied to the appellant. He had relied in his grounds of appeal on a risk from Al-Shabab, that removal would be in breach of Articles 2 and 3 of the Human Rights Convention and the private and family life that he had established in the UK.

2. The appellant's claim was that he is from the Bajuni clan which is a minority clan in Kismayo. He had arrived in the United Kingdom in 1999 when he unsuccessfully claimed asylum and was subsequently granted exceptional leave to remain for four years leading to the grant of indefinite leave to remain in 2005.
3. By the time the matter came before the panel, the family life had come to an end. The panel did not accept the claimed clan membership or that the appellant had established any risk to himself in Mogadishu or elsewhere in Somalia. His removal would not be contrary to Article 3 or in breach of Article 15(c) of the Qualification Directive. As to the appellant's private life, the panel concluded there were no exceptional circumstances to outweigh the public interest in deportation.
4. The challenge to the panel's determination relates to its refusal to grant an adjournment for the production of an expert report on the appellant's claimed ethnicity. The second grounds argues that the panel erred by taking factors taken into account in deciding the ethnicity question that were not put to him.
5. After reviewing the history of this matter including the directions that had been issued at the case management review, the reasons given for not adjourning the case prior to the hearing and the fact that legal aid funding was in place for the instruction of an expert report at the time of the hearing, Mr Harrison sensibly accepted that there had been procedural unfairness. In consequence he considered that the case should be remitted to the First-tier Tribunal.
6. The background is that on 12 December 2013 the appellant was convicted at Aylesbury Crown Court of being concerned in supplying a controlled class A drug to another for which he was sentenced on 30 January 2013 to fourteen month's imprisonment. On 1 March 2013 he was served with notice informing of his liability to deportation. The appellant made a human rights and asylum claim by way of response. The decision that s.32(5) of the 2007 Act applied was made on 22 April 2014.
7. The chronology of events relevant to the issue of adjournment is as follows. A case management review was due to take place on 11 June 2014. On 9 June the appellant's current solicitors wrote to the First-tier Tribunal explaining that although they were instructed, due to the terms of their contract with the Legal Aid Agency, they were unable to grant legal help or undertake substantive work without establishing the means of the appellant's partner. They had written to her but would not be able to confirm the appellant's eligibility for legal help in time to prepare for the case management review hearing. They added this:

"Our preliminary assessment of N's case indicates that his claimed ethnicity is a central issue to his appeal, one which is currently disputed by the Home Office. Whilst we have yet to substantively assess this case in accordance with our contract with the Legal Aid Agency, an expert report on this matter would assist the Tribunal in determining this issue.

In the event that we are have [sic] able to confirm N's eligibility for legal aid, we would take steps to source and instruct an expert in this matter. Of course, in the event that we are not able to confirm his eligibility, we would not be able to assist under LA Legal Aid.

In view of this, we request an adjournment of N's hearing for a period of six weeks (that is until 21/07/14) to enable us to;

...

1. Confirm eligibility for legal help.
 2. Fully assist N's case.
 3. Instruct a country expert.
 4. Obtain a report in relation to N's nationality.
 5. Consider the content of the report and take instructions from N.
 6. Prepare a Respondent's bundle in relation to the appeal hearing."
8. The directions that were issued indicated that the case would remain listed for hearing on 9 July 2014 but with the added provision "in the event that the representatives obtain public funding they are at liberty to seek further directions."
9. On 30 June 2014 Duncan Lewis wrote to the Upper Tribunal confirming their client's eligibility for legal aid and they had been able to fully consider the case and take further instructions. Several experts had been contacted to provide quotations for the preparation of a report and they had written to the Legal Aid Agency to request an extension of the upper costs limit to cover the costs of the report. In their experience the agency were taking three to five days to respond. The chosen expert would need to attend the appellant in detention for which 24 hours' notice would be required and a further three to five days to prepare the report. The process would take nine to thirteen working days. An adjournment until 28 July 2014 was requested. The letter included an email from the intended expert, Samuel Bekalo confirming amongst other matters the time that he would need to compile a report.
10. The application was refused by a designated judge of the First-tier Tribunal in these terms:

"This appellant has accumulated 58 convictions on 30 separate occasions since he entered the United Kingdom illegally in 1999. His asylum claim was refused in 2000. He has had years with which to obtain evidence as to his claimed ethnicity. I note that he could not name the Bajuni sub-class or the islands where they lived. In the representative's letter of application they referred to his "Bajuni" ethnicity, which is a cause for concern. I do not accept that refusing this late adjournment request would prevent the just disposal of this appeal."

11. The application for adjournment was renewed before the panel. According to the record of proceedings, Mr Martin, counsel who represented the appellant, confirmed that legal aid funding was in place. He did not know when the solicitors had been instructed nor when the appellant had been granted legal aid. My inference from the record is that the panel noted the correct answers to these two latter points as two weeks and 24 June 2014. The application was opposed by the respondent.
12. The panel's reason for refusing the application was in the following terms. It had been submitted that an expert would assist the court in relation to any difficulties the appellant would suffer in Somalia by virtue of his physical appearance. Such an expert could comment in addition on his knowledge of the area and his knowledge of Kibajuni and Swahili. The panel observed

“Mr Martin explained that legal aid had been granted on 24 June 2014 and as at the date of hearing funding for an expert's report was not in place. It followed that no expert has in fact been instructed. In the circumstances, we were not satisfied that legal aid funding would be available for the purposes of an expert report. Furthermore, we concur with the reasons given on an earlier occasion to refuse the application for an adjournment on the grounds that the appellant has had a substantial amount of time to obtain evidence as to his claimed ethnicity and that refusing his late adjournment request does not prevent the just disposal of his appeal.”
13. In granting permission to appeal Upper Tribunal Judge Rintoul observed that it was arguable the expert report could have affected the core finding that the appellant is not from the Kibajuni minority group.
14. In the course of his submissions, Mr Harrison referred to the Rule 24 response opposing the appeal. Given the further information that could and should have become available to the Tribunal he believed the case would have been adjourned. He acknowledged the core issue was that of ethnicity and despite the inconsistencies in the evidence, the fact remained that a report would have assisted the appellant's case. In his view the appellant had been prejudiced and the appropriate remedy was for the case to be remitted to the First-tier Tribunal.
15. For her part Ms Capel explained she had no information from counsel who represented the appellant in the First-tier Tribunal but she observed that he was certainly wrong about whether controlled representation was in place.
16. It appears to me that even if the panel cannot be criticised for failing to act on information that was not before them or had been incorrectly given, I was nevertheless concerned by its adoption of the earlier reasons given for refusing the adjournment application. The seriousness of the criminal offending in the United Kingdom did not bear any relevance to the protection issue at stake which it was argued required the expert report.

17. Ms Capel explained that were she required to her argument would be the appellant had been deprived of a fair hearing and relied on the decision by the Upper Tribunal in *MM (unfairness; E & R) Sudan* [2014] UKUT 00105 (IAC). In the event it was unnecessary for her to do so in the light of Mr Harrison's concession.
18. By way of conclusion therefore I find error of law by the First-tier Tribunal in refusing to grant the adjournment sought. I set aside its decision and remit the matter to the First-tier Tribunal to remake its decision before a differently-constituted Tribunal.
19. As this is a protection case, I make an anonymity order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 prohibiting the disclosure or publication of any matter likely to lead members of the public to identify the appellant.

Signed

Date 13 March 2015



Upper Tribunal Judge Dawson