Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01941/2014

THE IMMIGRATION ACTS

Heard at Glasgow	**Decision & Reasons Promulgated**
on 14 July 2015	**On 20 July 2015**

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ABDALLA ALI HEMED

Respondent

Representation:

For the Appellant: Mrs M O'Brien, Senior Home Office Presenting Officer
For the Respondent: Mr S Winter, Advocate instructed by Latta & Co, Solicitors

DETERMINATION AND REASONS

1. The parties are as described above, but are referred to in the rest of this determination as they were in the First-tier Tribunal.

2. The appellant is a citizen of Somalia, born on 26 February 1964. On 3 April 2002 he was recognised as a refugee in the United Kingdom. A letter dated 10 September 2013 notifies him of the respondent's intention to cease his refugee status. The letter records at page 2 that it was accepted at the time of his asylum claim that he was "a Somali national of Bajuni ethnicity … born and raised in Kismayo, which holds a sizeable Bajuni community … [who] could speak broken Somali."

3. The appellant was convicted on 20 June 2008 in the High Court of Justiciary at Glasgow. The judge said:

> The jury found you guilty of 2 charges of rape and 2 charges of assault with intent to rape, and a charge of a breach of the peace involving a knife. The knife also featured in certain of the other charges. You are said to be of a high risk of sexual re-offending, so you are clearly a danger to the public and to women in particular.
>
> I … consider it appropriate to impose an extended sentence. The total … will be a period of 12 years, the custodial part will be 9 years, the extended part 3 years, and I recommend at the end of your sentence you should be deported.

4. On 14 July 2008 and again on 7 August 2013 the respondent served the appellant with notice of liability to deportation and with notice of his opportunity to rebut the presumption that he had been convicted of a particularly serious crime and constituted a danger to the community of the United Kingdom.

5. The appellant does not appear to have sought to rebut the presumption. He maintained that he ought not to be removed because he remained at risk under the Refugee Convention. (He relied alternatively on grounds under Articles 2 and 3 of the ECHR, which effectively coincide with the Refugee Convention case, and on Article 8 of the ECHR. Article 8 grounds are no longer maintained.)

6. By letter dated 9 October 2014 the respondent told the appellant that his refugee status had been ceased, on the view that the Bajuni minority in Kismayo and the adjacent islands no longer face persecution, and that alternatively the appellant could relocate to Mogadishu. The decision is made (paragraph 56) because the respondent is satisfied that the circumstances in connection with which the appellant was recognised as a refugee had ceased to exist in terms of Article 1C(5) of the Refugee Convention as mirrored in paragraph 339A(v) of the Immigration Rules HC395.

7. The letter advises the appellant that he does not have a right of appeal against the decision to cease his refugee status, but that he does have an opportunity to appeal against the accompanying immigration decision.

8. The appellant was served also with a letter and a notice dated 14 October 2014 setting out reasons for making a deportation order and advising him of his rights of appeal.

9. (The respondent's decision is based on 339(a)(v) of the Rules and not on (x) which provides that a person's grant of asylum will be revoked or not renewed if the Secretary of State is satisfied that "having been convicted by a final judgment of a particularly serious crime he constitutes a danger to the community of the United Kingdom".)

10. The appellant appealed to the First-tier Tribunal. Judge Farrelly allowed his appeal by determination promulgated on 25 February 2015. The judge notes that removal of refugee status was solely on the basis of the country situation and not of criminal conduct. He concludes at paragraph 38,

having regard to the country information, that the appellant remains at risk. The appeal is therefore allowed under the Refugee Convention and under Articles 2 and 3 of the ECHR.

11. The SSHD appeals to the Upper Tribunal on grounds which in summary are as follows:

> Ground 1 – material misdirection in law – findings.
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> Failure to make findings on credibility of appellant's assertions about family and support in Somalia or elsewhere; findings should have been made on basis of appellant's evidence and not just his clan; failure to follow country guidance case law on whether minority clan members might have protection from a majority clan; treating all ethnic minorities as having the same circumstances; finding it improbable that the appellant was from a prominent business family as stated in a probation report, when he was the source of the claim; lack of findings on the appellant's evidence that he had tried to locate his family in Kismayo by way of a friend who knew indirectly of his family.
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> Ground 2 – material misdirection in law – burden of proof.
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> The judge founded on lack of indications of family support or anyone in the UK who might send remittances, which switched the burden of proof to the respondent, and was contrary to case law on the burden on an appellant to show why he might not sustain himself or be sustained on return; failure to have regard to the cost of entering the UK irregularly, being $15,000-25,000.
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> Ground 3 – material misdirection in law – approach to minority status.
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> The judge's finding of residual risk to ethnic minority clans was contrary to country guidance that clan identity did not bar working; the clan was not relevant to protection but to social support; and that Mogadishu is a multi-clan environment. Failure to provide findings on how the appellant would not be able to work in Mogadishu and failure to make findings on the appellant's oral evidence that he worked as a mechanic in Somalia.

12. The country guidance cases principally relied upon in the grounds are *KS* [2004] UKIAT 00271, *HH* [2008] UKAIT 00022 and *MOJ and Others* (return to Mogadishu) [2014] UKUT 442.

13. The grounds rely at paragraphs 10 and 16 on a witness statement by the Presenting Officer at the First-tier Tribunal hearing. The statement records that the appellant gave evidence that he tried to find out about his family through a friend, and that he was a fisherman and helper/mechanic in Somalia at a subsistence level.

14. Mrs O'Brien submitted as follows. The judge failed to particularise or make clear findings on the appellant's circumstances or on any difficulties he might face if returned to Somalia. The revocation of refugee status was plainly on the basis that conditions in and around Kismayo were no longer as at the time of the grant of asylum or as at the date of country guidance. The determination lacked findings on the appellant's circumstances on return. The respondent continues to accept that the appellant is a Bajuni from Somalia, but does not now acknowledge that as a basis for a grant of protection. Any residual risk to minority clans or groups did not by itself justify refugee status. The determination should be set aside and remitted to the First-tier Tribunal for rehearing.

15. In a Rule 24 response and in submissions the appellant argued as follows. The central issue was whether the respondent showed a change of circumstances which were "significant and of a non-temporary nature in order to justify the decision to cease refugee status." The judge found that the respondent had not met that burden. There was no challenge to those findings. The grounds were therefore irrelevant.

    As to the specific grounds, the judge did made findings about family and support in Somalia, namely that those were lacking. Those were findings he was entitled to make. They corresponded with the original grant of status. The respondent had not previously taken issue on those points. The cases relied upon related to various minority clans and to minorities marrying into majority clans, circumstances not relevant to the present case. The judge also had the benefit of an expert report. He did not treat all ethnic minorities as the same but had in mind that this claimant was Bajuni. On ground 2, the judge did not switch the burden of proof, but accepted the appellant's explanation of his position, which again had not previously been disputed by the respondent. The judge effectively found that the appellant did fall into a category within *MOJ* requiring protection. The issue of expense of travel to the UK dated back a very long time and had not been raised prior to these grounds. On ground 3, *MOJ* did not expressly overturn any previous case law relating to the Bajuni minority. The expert report showed them to be a marginalised group. No error was shown in terms of country guidance.

    The judge refers at paragraphs 27 and 28 to an expert report by Dr M Hoehne, of the University of Leipzig, dated 18 December 2004. He does not mention it again in reaching his conclusions but it plainly played a part in his decision. Mr Winter referred me in particular to paragraph 41 of that report, where it is noted that *MOJ* was not concerned with the situation in Kismayo; 42, membership of the Bajuni might not expose him to systematic persecution but "did not put him in a very strong position"; the Bajuni were still a marginalised group who could not expect any kind of stable clan protection, rather it was probable that they were looted and/or forced to join various sides; 43, return to Mogadishu would involve "massive structural marginalisation"; the Bajuni had no substantial presence there; in Kismayo he would face "not only structural marginalisation but even more immediate risks to his life. Al Shabaab still operates in and around the city and majority clan militias are in conflict over power there. This provides for massive instability in and around Kismayo which affects a person belonging to a minority group without active family relations on the ground extremely negatively, and certainly much worse than a member of a majority group with recent experience in the area and/or active family support".

16. I reserved my determination.

17. The grounds of appeal put the cart before the horse regarding (a) general country findings and (b) findings on the appellant's particular circumstances. As Mr Winter submitted, they do not attack the judge's

essential finding that country conditions had not changed to the extent of removing the risk previously recognised.

18. The grounds fail to recognise that the appellant is acknowledged to be a member of the Somali Bajuni, who form a small and unusual minority confined to a restricted area. The background evidence and case law over the years have made it clear that they are not a minority clan or any part of the general Somali clan structure. They are closely associated with (if not part of the same group as) the Bajuni who live across the border in Kenya. They have no significant presence in Mogadishu. Somali is not their principal language. The respondent recorded the appellant originally as speaking broken Somali. In the statement he provided for these proceedings he says that he speaks English, Kibajuni and Swahili. Kibajuni (in which he seems to have given evidence) is closely related to or a dialect of Swahili (or Kiswahili). Being a Bajuni and not a fluent Somali speaker, there would be no realistic prospect of his relocation to Mogadishu. The case turned on whether the judge was correct in holding at paragraph 38 that there had been no such change in the country (he might have said, in the appellant's particular area of the country) such that he could be returned.

19. I find the particular points in the grounds weak and diffuse. The judge said that there was no evidence of family support in Somalia or of possible sources of remittances from the UK. That was accurate, and did not reverse the burden of proof. It is too late now to raise the question of the cost of travel in 2001, which was not put to the judge. It is far from clear why the statement from the Presenting Officer is produced. The judge made no findings which were contrary to the appellant's oral evidence that he tried to locate his family by way of "a friend who knew people who knew people who were friends of his family". If paragraph 10 of the grounds seeks to show that such evidence should have led to the conclusion that the appellant must have support in Kismayo, that is absurd. The grounds at paragraph 16 do not say what finding the judge "impermissibly failed to make" on the basis of the appellant's evidence that he worked as a mechanic in Somalia, or what bearing any such finding might have had on the outcome.

20. The respondent's grounds do not show that the determination makes any error on a point of law which requires it to be set aside. The determination shall stand.

21. No anonymity order has been requested or made.

Hugh Macleman

Upper Tribunal Judge Macleman 17 July 2015