



**Upper Tribunal
(Immigration and Asylum Chamber)
PA/05135/2016**

Appeal Number:

THE IMMIGRATION ACTS

Heard at Royal Courts of Justice

On 4 May 2017

**Decision & Reasons
Promulgated
On 25 May 2017**

Before

UPPER TRIBUNAL JUDGE PITT

Between

Y A A

(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Slatter, Counsel instructed by Polpitya & Co
For the Respondent: Mr S Kotas, Senior Home Office Presenting Officer

ERROR OF LAW DECISION

1. Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I continue the anonymity order made by the First-tier Tribunal. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original appellant. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings. I do so in order to avoid a likelihood of serious harm arising to the appellant from the contents of the protection claim.

2. This is an appeal against the decision promulgated on 5 December 2016 of First-tier Tribunal Judge Chamberlain which refused the protection and human rights claim of the appellant.
3. The appellant was born in Somalia on 25 November 2001. He came to the UK on 17 November 2015 and claimed asylum. His application was refused by the respondent on 16 May 2016. Because of his age, however, the applicant was granted discretionary leave to remain until 10 November 2018. He appealed the refusal of his asylum claim and a hearing took place before Judge Chamberlain on 22 November 2016. The appellant disagreed with her decision and therefore challenged it, permission to appeal being granted by First-tier Tribunal Judge Andrew in a decision dated 13 March 2017 which was issued by the Tribunal on 22 March 2017.
4. The appellant's asylum claim is that he is from the minority Ashraf clan. That aspect of his claim is not disputed. The appellant also maintains that he lived with his family in Mogadishu until, in 2009, his mother, brother and sister left Mogadishu for Kenya. The applicant remained behind living with his uncle.
5. The applicant also maintains that his older sister, AA, left Somalia for the UK in 2009. It is undisputed that she was subsequently recognised as a refugee and is now settled here.
6. The appellant's account of his history from 2009 to 2015 when he was living with his uncle in Mogadishu is that he and his uncle were able to live in the uncle's home and find work to support themselves. The appellant maintained that his uncle was killed in an explosion in November 2015. A friend of his uncle was able to bring the appellant to the UK where he claimed asylum and was able to make contact with his sister, AA, with whom he went to live.
7. First-tier Tribunal Judge Chamberlain did not find the evidence of the appellant's mother and siblings living in a refugee camp in Kenya to be credible. She therefore assessed the risk on return to the appellant on the basis that his mother and siblings were in Mogadishu. After applying the Country Guidance case of MOJ and Others (return to Mogadishu) Somalia CG [2014] UKUT 00442 (IAC) to the findings of fact, she concluded that the appellant's protection and human rights claims were not made out.

The Grounds

8. The appellant brought two main challenges to the decision of the First-tier Tribunal. Firstly, he maintained that the credibility finding on the evidence that the appellant's mother and siblings were in a refugee camp in Kenya contained errors of law.
9. The first ground contained a number of elements. Firstly, at paragraph 3 of the grounds, the respondent had not challenged the appellant's evidence that his family were in Kenya so it was not a live matter before the First-tier Tribunal. In addition, at paragraph 4 of the grounds, where this was

not a live issue, the judge had erred in placing weight on the absence of documentation showing the family to be in Kenya.

10. Secondly, at paragraph 5 of the grounds, the judge had made a material error of fact as to the appellant's oral evidence at the hearing concerning his mother being in Kenya.
11. Thirdly, at paragraph 6 of the grounds, the First-tier Tribunal took an erroneous approach to the evidence of the appellant's sister as to when she knew that the appellant's uncle had remained in Somalia.
12. The appellant second ground of appeal was that the First-tier Tribunal had failed to distinguish MOJ in light of new country evidence.

Discussion and Findings

13. I did not find that the appellant's first ground had merit. It is correct that the respondent made no comment in the refusal letter on the appellant's claim that his family were in Kenya. However, firstly, the appellant, who had legal advice at all material times, was not entitled to take the absence of a specific rejection of this part of his account in the refusal letter as a concession that bound the judge. The absence of a view from the respondent on the point in the refusal letter was not capable of amounting to a legally binding concession.
14. Secondly, the issue of the family being in Kenya was the subject of evidence, cross-examination and submissions at the hearing; see [22], [26], [30] and [31]. The decision records at [22] that the respondent specifically raised the issue at the hearing. It is not correct to suggest that it was not a live issue at the hearing, therefore. There is no suggestion that the appellant, his sister or his legal advisers were taken by surprise before the First-tier Tribunal at the respondent seeking to dispute the evidence of the family living in Kenya. There is also no suggestion that an adjournment was sought in order to address the issue or obtain documentary evidence showing the family were living in a refugee camp in Kenya. Where the account was that the family had been in a camp in Kenya since 2009 and the sister had been in touch with them, it was reasonable for the judge to expect some corroborative evidence to have been obtained.
15. Thirdly, the First-tier Tribunal did not err in her record of the appellant's evidence on the whereabouts of his mother and was entitled to place adverse weight on that evidence.
16. At the hearing before me the legal representatives had the opportunity of comparing the judge's record of proceedings to that of the appellant's legal representative at the First-tier Tribunal hearing. The judge's record of proceedings states that the appellant was asked "Is your mother still in Somalia?". His response was "The last time I spoke to her she was in Somalia". The next question is recorded as "Last time in Somalia?". The appellant's response was "No, at a refugee camp in Kenya". This is consistent with the handwritten record of proceedings from the appellant's

legal representative before the First-tier Tribunal. The records are the same other than the absence of the checking question, "Last time in Somalia?" in the record of the legal representative.

17. The evidence before the First-tier Tribunal was therefore that the appellant said initially that his mother was in Kenya and then stated that she was in Kenya. The judge was entitled to find at [26] that the appellant had changed his evidence and to draw an adverse conclusion from this.
18. In addition, that finding was made in the context of the appellant's oral evidence was that he knew his mother was in Kenya because his sister had told him this; see [25]. The sister was found in her own asylum appeal and before this First-tier Tribunal to be a significantly unreliable witness; see [23], [24], [28], [30] and [31]. Where the appellant's evidence on the family being in Kenya changed and was stated by him to have come from his sister, Judge Chamberlain was entitled to find that part of the claim lacking in credibility, regardless of the appellant's statement in his witness statement dated 23 December 2015 that his uncle had told him that his mother and sister were living in a refugee camp in Kenya.
19. The grounds only challenge the findings of the sister being a significantly unreliable witness concerning the issue of when she knew that her uncle was still in Mogadishu. This was addressed at [29]:

"The Appellant's sister had told the Tribunal in her own appeal that she had been unable to find any family members, and did not know where they were. However, she accepted in evidence before me that she knew that the Appellant was living in his uncle's home, which was the same house in which his uncle had been living before she left Somalia. She did not answer the question of why she had not tried to contact her uncle when she arrived in the United Kingdom, but answered this question by saying that her mother had told her before she left Somalia that she was going to Kenya, and that was why she had not contacted her mother. She said that she did not have her telephone number. She did not address the issue of why she had not contacted her uncle. I find that when the Appellant's sister arrived in the United Kingdom in 2009 her claim that she had no relatives remaining in Mogadishu was untrue. I find that she knew it to be untrue, and she has acknowledged that her uncle was living in Mogadishu."

20. This paragraph is clear. The sister's evidence before Judge Chamberlain was that she knew before the appellant came to the UK that he was in Mogadishu with his uncle. She was asked why she did not try to contact the uncle. If her evidence was, in fact, that she had only learned of the appellant living with his uncle in Mogadishu after the appellant came to the UK and after the uncle had been killed, she would not have been asked why she had not contacted the uncle. If she had been asked that question nevertheless,, she could simply have said that she had only found out after the uncle had died and the appellant had come to the UK. She did not. She did not answer the question as to why she did not contact her uncle. The First-tier Tribunal was entitled to draw a negative credibility finding from this.

21. In addition, as above, this finding was not made in isolation but in the context of the significant other concerns the judge had about the evidence of the sister. She was found in her own appeal to have given unreliable evidence about her knowledge of the whereabouts of family members; see [23] and [24]. It was also made in the context of the sister giving unreliable evidence as to how she could be a full sibling of the appellant if their father disappeared more than 9 months before he was born; see [28].
22. At the hearing before me, Mr Slatter raised other points going towards this ground but they were not, on any reading, issues contained in the written grounds and no application was made to amend the grounds and seek permission to appeal. I do not comment further on them, therefore.
23. The applicant's second main challenge submitted that, even if his mother and siblings were in Mogadishu, the First-tier Tribunal Judge had failed to assess the risk on return in light of the new material before her as well as that in the Country Guidance case of MOJ.
24. The case of SG (Iraq) v SSHD [2012] EWCA Civ 940 provides an answer to this ground. In that case the Court of Appeal provides guidance on the correct approach to Country Guidance cases. The Court stated at [45]:

"45. It is for these reasons, as well as the desirability of consistency, that decision makers and tribunal judges are required to take Country Guidance determinations into account, and to follow them unless very strong grounds supported by cogent evidence, are adduced justifying their not doing so."
25. Nothing here indicates that the appellant's case before Judge Chamberlain was that there were "very strong grounds supported by cogent evidence" for not following MOJ. The skeleton argument before the First-tier Tribunal sets out part of the head note of MOJ and then under the heading "Home Office Directives" in paragraph 17 and then in paragraphs 27 and 28 (the numbering appearing to be a typographic error), refers to country evidence postdating MOJ. The skeleton does not argue at all that the new evidence was capable of distinguishing MOJ or capable of meeting the test for doing so from [45] of SG (Iraq). In fact, the record of proceedings records that the oral submission for the appellant was that he came within the head note of MOJ.
26. The First-tier Tribunal here therefore took a correct approach in applying the guidance in MOJ and where the facts were that the appellant and his uncle lived there for a number of years without difficulty, both finding employment, and that he had family to return to, it was open to Judge Chamberlain to find no risk on return.
27. For all of these reasons I did not find that the decision of the First-tier Tribunal Judge disclosed an error on a point of law.

Notice of Decision

28. The determination of the First-tier Tribunal does not disclose an error on a point of law and shall stand.

Signed: 
Upper Tribunal Judge Pitt

Date: 24 May 2017