Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/09828/2016

THE IMMIGRATION ACTS

Heard at Birmingham Employment Tribunal	**Determination & Reasons Promulgated**
On 23rd June 2017	**On 29th June 2017**

Before

UPPER TRIBUNAL JUDGE COKER

Between

MS

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms S Alban, Sultan Lloyd solicitors
For the Respondent: Ms S Petterson, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. 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/parties in this determination identified as MS and her son AM. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings

1. MS, a Somali citizen, arrived in the UK on 30 December 2012 and claimed asylum on 22nd January 2013. Her asylum claim was refused on 21st February 2013 and her appeal against that decision dismissed in a decision promulgated on 29th April 2013. Applications for permission to appeal to the First-tier Tribunal and the Upper Tribunal were refused and she became appeal rights exhausted on 3rd July 2013. She did not leave the UK. She made further submissions on 21st October 2013, 8th August 2016 and 11 August 2016. These were treated by the respondent as a fresh claim under paragraph 353 Immigration Rules. Her asylum claim was refused for reasons set out in a decision dated 1st September 2016. MS' appeal against that decision came before First-tier Tribunal Judge Lodge on 2nd December 2016 and in a decision promulgated on 11 December 2016 he dismissed her appeal on international protection and human rights grounds. Permission to appeal that decision was sought on the grounds, in summary,

   (a) The judge erred in failing to make a finding that MS is the mother of AM, who is a member of the Ashraf clan and has been recognised as a refugee in the UK;
   (b) Erred in failing to make an adequately reasoned finding whether MS was or was not a member of the Ashraf clan;
   (c) Erred in failing to make an adequate assessment whether relocation to Mogadishu would be unduly harsh. *MOJ* does not relate to lone women; *NM and others (lone women – Ashraf) Somalia CG* [2005] UKIAT 00076 (IAC) *and AMM and others (conflict; humanitarian crises; returnees; FGM) Somalia CG* [2011] UKUT 0045(IAC) apply and have not been considered.
   (d) Erred in failing to have adequate regard to the evidence of the dependency between MS and AM in reaching his conclusion that Article 8 was not engaged.

2. Permission to appeal was granted by Designated Judge Peart on 13th April 2017 on all grounds.

3. The appellant had pleaded before the First-tier Tribunal that she was the mother of AM. She produced DNA evidence to that effect. It is surprising that First-tier Tribunal judge stated in §23

   "…For what it is worth if I had to make a finding I would find that the Appellant is the mother of [AM] and is younger than she says…"

   It may be that the judge did not consider that an actual finding was relevant, but the appellant was entitled to have a *finding* made on a matter that she considered underpinned her asylum and human rights claim. MS claims a date of birth of 1st January 1942. AM in his SEF dated 28th May 2004 said his mother was aged about 50. Judge Lodge considers the discrepancy, refers to judge Broe's decision in 2013 which refers to AM taking that view based on his memory when he last saw her, considers that if she were the age she claimed she would have been aged about 47 or 48 when she gave birth to AM (unlikely but not impossible) whereas if she had been about 50 as AM claimed, she would now be about 62. Judge Lodge set out the evidence he considered in reaching

his 'possible' finding. The grounds of appeal relied upon do not dispute that evidence, rather they challenge the failure to make an actual finding. I took the view, which I expressed to the parties that although expressed as "for what it's worth" this could be treated as a finding of fact namely that MS is the mother of Am and she is younger than she claims. There was no dissension to this.

4. It was submitted to the First-tier Tribunal that because she is the mother of AM and it has been accepted by the respondent that he is Ashraf, then so is she. The evidence before First-tier Tribunal Judge Broe led him to conclude that she was not Ashraf. MS' appeal against that decision was unsuccessful. The new evidence, which Judge Broe did not have, was that MS and AM are mother and son. Judge Broe did accept there was a connection between MS and AM. Judge Broe records, in his decision, MS' lack of knowledge of the Ashraf clan. It is well known that intermarriage between clans occurred and occurs in Somalia. It does not necessarily follow that because AM is Ashraf then so is his mother.

5. Judge Lodge took the view that whether she was Ashraf was immaterial to his decision in the light of *MOJ*. Judge Broe considered the evidence before him which was, in summary, as follows:

   * MS had previously applied for family settlement in 2007, from Ethiopia, such application being refused and her appeal dismissed; her application had not included the name 'Sharif';
   * she had memory problems and suffered from headaches and pains in her knees; she had been tired when she was interviewed by the SSHD;
   * her husband and eldest son were killed by the Hawiye about 1995 or 1985, the latter date being some two years before the birth of AM;
   * she claimed to be Ashraf but did not know any of the customs peculiar to the Ashraf; she claimed they lived peacefully alongside the Hawiye although she also said they lived alongside the Hawiye;
   * she had said that the Ashraf minority clan were farmers and livestock traders whereas the background material indicated that they were almost exclusively involved in commercial operations; her evidence was that her family had a house and a shop until it was taken away by the Hawiye;
   * she had no relatives in Somalia but in oral evidence she said she had many family members in Somalia, distant and near relatives and her clan was in Somalia;
   * she had a brother in Saudi Arabia who had paid for her to get to the UK; AM in his evidence said her brother was in Somalia, was aged over 80 and too old to look after her; the appellant accepted in oral evidence she had a brother in Somalia;
   * she claimed to have left Somalia in 2007.

6. Judge Broe took account of her inability to answer questions about the Ashraf clan, that she had lived in Somalia until at least 2007, that she had initially denied having any relatives in Somalia but during the hearing had accepted she did have relatives there and it was not credible that, as a lone female she did not have support during the time she was there – a very volatile period. There was no DNA evidence before him. He concluded that she was not related as claimed to AM and that she was not Ashraf.

7. There was DNA evidence before First-tier Tribunal Judge Lodge. Judge Lodge took the view that the relationship between AM and MS was not material to the decision whether MS was Ashraf. Before Judge Broe and Judge Lodge it was submitted that MS suffered from dementia and this affected her ability to provide accurate answers to questions and give consistent evidence. Although AM gave evidence of his need to take MS to hospital and wake her at midnight for her medication, the actual medical evidence before the First-tier Tribunal on both occasions did not give rise to any indication that either her ability to give evidence was impaired or that her 'late onset' Alzheimer's disease (not late stage as pleaded in the grounds seeking permission to appeal to the Upper Tribunal) impaired her evidence before Judge Broe. She was not called to give evidence before Judge Lodge. The medical evidence before Judge Lodge stated: "Due to her condition she has moderate problems with short term memory as well as motivation".

8. The fact that AM was recognised by the SSHD as a refugee based on his claimed clan membership as Ashraf does not necessarily result in a finding that MS is Ashraf. First-tier Tribunal Judge Broe found, on the evidence before him to find that she was not Ashraf and this, as identified by Judge Lodge, is his starting point. The claimed clan membership of AM was not, on the evidence before the Tribunal, established through any judicial process but was accepted by the respondent to be as claimed. Families may be of differing clan affiliation. The grounds relied upon assert that Judge Lodge found the appellant was not Ashraf and refer to [20] of the decision. [20] does not set out such a finding but states that he, Judge Lodge, does not accept that having a mother/son relationship is material to deciding whether she is Ashraf. He rejects the contention that because AM is Ashraf then MS must be Ashraf in [25]. It is difficult to see what conclusion Judge Lodge reaches with regards to her claimed clan membership. There is certainly no finding that she is not Ashraf. On balance I take the view, that Judge Lodge concludes that MS is Ashraf and I have proceeded on that basis.

9. In any event, as has been made plain in *MOJ*, clan membership is no longer a significant matter in terms of establishing whether an individual should be recognised as a refugee.

10. The evidence before Judge Broe, although denied before Judge Lodge by AM, was that the appellant has near and distant relatives and clan members in Somalia. She had continued to live in Somalia after her husband and son died until at least 2007, a period of great upheaval and violence. She had given no evidence of having had difficulties or problems during that time. Her brother who was possibly at some time living in Saudi Arabia, had returned to live in Somalia because of health problems, it is unclear when because AM initially denied there were relatives in Somalia. Evidence of his health problems or why he preferred to be treated in Somalia was not given. It was claimed that he was over 80 years old, but it had also been claimed that the appellant was 72 whereas the "finding' by the First-tier Tribunal Judge Lodge that she was younger was sustainable on the evidence before him. AM's evidence was that he had lost contact with MS after 2007 until she came to the UK in 2012. Someone had paid for her to travel

to the UK in 2012. The findings by Judge Lodge are not perverse on the evidence before him. The grounds relied upon to challenge these findings are simply a disagreement with findings that were open to the judge.

11. In any event the significant issue before the First-tier Tribunal, and thus before me, is whether, on the facts as found in the context of the background material and case law, return of MS to Mogadishu would be unduly harsh.

12. The findings of Judge Lodge are that MS is aged between 62 and 72. She has late onset Alzheimer's resulting in moderate problems with short term memory and motivation. Her brother is in Somalia, where he returned from Saudi Arabia following health problems. She remained in Somalia until at least 2007 after her husband died (probably around 1995) without significant problems. She has near and distant relatives in Somalia. Her son, AM, who is in the UK and a British Citizen, has confirmed he will be able to financially support her with remittances from the UK. Someone financed her trip to the UK in 2012 – not her son according to his evidence. She is Ashraf, although her membership or otherwise of that clan is of little impact in the light of the presence of relatives.

13. First-tier Tribunal Judge Lodge considered *MOJ* and considered the question of the appellant's return as a lone female. He rejected the submissions that she would be vulnerable, taking account of the above matters.

14. Before me it was submitted that *MOJ* does not consider the position of lone females with no support in Mogadishu and that the relevant case law of *NM* and *AMM* should have been considered. It is correct that *NM* and *AMM* were not considered by Judge Lodge and that *MOJ* does not consider the position of lone females without support.

15. *NM* found that the general conditions of life or circumstances in Somalia do not engage the obligations of the Refugee Convention for female returnees (§125). §128 holds that internal relocation is not a viable option for members of minority clans except where they may be able to obtain majority clan protection in a secure area. But of course, *MOJ* has now made clear that clan membership is not a defining characteristic either for recognition as a refugee or in determining the issue of internal relocation.

16. The guidance in *AMM* includes that it is for the appellant to make good an assertion that, notwithstanding the general conditions in the proposed place of relocation, it would not be reasonable to relocate there. She referred to the finding that women travelling without male friends or relatives are in general likely to face a real risk of sexual violence. Although Ms Alban referred to *AMM* and *NM*, she was not able to identify to me any issues dealt with in those cases that had a bearing on MS given the facts found by First-tier Tribunal Judge Lodge. Although Judge Lodge did not specifically consider these cases, based on the facts as found by him, which are not disturbed, his conclusion that the removal of the appellant to Mogadishu should be considered in terms of *MOJ* is sustainable.

17. My attention was drawn to the August 2016 Country Information and Guidance Somalia: Women fearing gender based harm and violence report. :

> "2.4.2 In general, a woman fearing sexual or gender based violence is unlikely to be able to access effective protection from the state. Traditional laws, often used instead of a weak state judiciary, discriminate against women and girls…
> ….
> 2.5.1 The relevance and reasonableness of internal relocation must be assessed on a case-by-case basis taking full account of the individual circumstances of the particular person.
> 2.5.2 For single women and female single heads of households with no male protection, especially those originating from minority groups, internal relocation will not be available in the absence of meaningful support networks or a real prospect of securing access to a livelihood.
> ….
> 3.1.2 …women without family or clan support and IDP women are in general likely to be at real risk of gender based violence or serious harm on return.
> ….
> 3.1.5 Internal relocation to Mogadishu to avoid risk from gender-based violence may be viable in some cases, in particular where the person has a support network, etc. Single women are unlikely to be able to relocate.

18. This policy guidance reflects the guidance given in *MOJ* but in the context of lone women. This appellant would not be going to Mogadishu as a lone single woman. By her own evidence, she has near and distant relatives there; her brother, given it was not her son, is likely to have paid for her to come to the UK. He left Saudi Arabia to return to Somalia, apparently voluntarily, something he is unlikely to have done if he considered that he would be in danger. MS' son has confirmed he will be able to financially support her. MS will not only have familial support but will also have financial support.

19. Although the grounds relied upon disagree with findings reached by the First-tier Tribunal judge, those findings are sustainable and there is no material error of law. Based on those findings, the conclusion reached by the First-tier Tribunal that it would not be unduly harsh for MS to be removed to Mogadishu is not infected by material error of law.

20. Permission was also granted in connection with the appellant's Article 8 rights. It was asserted the appellant was dependent upon her son and no evidence to dispute that had been provided. It is correct that no evidence to dispute that was provided but it is not the role of the respondent to produce evidence to rebut assertions made by appellant's in this context. The medical evidence was considered by Judge Lodge who found that it did not support the contention by the son that he had to wake her for her medication and provide her with a level of care that meant she was dependent upon him. The conclusion reached by Judge Lodge was plainly open to him on the evidence before him. there is no error of law in his findings that Article 8 is not engaged.

21. I do not set aside the decision.

Conclusions:

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

I do not set aside the decision.

The decision of the First-tier Tribunal dismissing MS' appeal against the respondent's decision stands.

Anonymity

The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I continue that order (pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008).

Date 28th June 2017

Upper Tribunal Judge Coker