



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: AA/05720/2015

**THE IMMIGRATION ACTS**

Heard at Manchester  
On 12<sup>th</sup> December 2017

Decision & Reasons Promulgated  
On 18<sup>th</sup> January 2018

Before

UPPER TRIBUNAL JUDGE KING TD

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

[S O]

Claimant/Respondent

**Representation:**

For the Appellant:

Mr A McVitie, Home Office Presenting Officer

For the Claimant/Respondent: Mr J Nicholson of Counsel, instructed by Greater  
Manchester Immigration

**DECISION AND REASONS**

1. This matter has a somewhat long and complicated immigration history. The claimant was arrested entering the United Kingdom in November 2009 and claimed asylum on the basis that he was a citizen of Somalia and a member of the Midgan minority clan.
2. In a decision dated 1<sup>st</sup> December 2009 the respondent rejected that claim on the basis that the Sprakab language report pointed to him being from Djibouti and that his

experiences generally as described were not those commensurate with a minority clan.

3. The claimant sought to appeal that decision to the First-tier Tribunal, which appeal was dismissed as was any further permission to appeal upon it.
4. Further submissions were made in April 2012, November 2012, December 2013 and 16<sup>th</sup> May 2014 but all were refused.
5. The claimant sought to renew his claim for asylum, which was refused by the respondent in a decision of 2<sup>nd</sup> March 2015, essentially on the same grounds as it had been refused previously. The claimant sought to appeal that decision to the First-tier Tribunal, which appeal came before First-tier Tribunal Judge Law on 14<sup>th</sup> January 2016. On that occasion a key witness for the claimant was his brother [MO]. That brother had been admitted to the United Kingdom for the purposes of family reunion to join his wife [RA]. Seemingly he had married in 2011 but had become separated from his wife and sought to enter the United Kingdom to be with her. The DNA test confirmed that he and the claimant were full brothers and he gave evidence before the First-tier Tribunal Judge concerning his nationality and clan membership, which clearly, if correct, would also apply to the claimant.
6. The Judge declined to give much weight to that evidence, finding that he should follow the findings of a previous Tribunal as to the credibility of the claimant and the Sprakab Report.
7. Upper Tribunal Judge Martin, in a decision at a hearing of 20<sup>th</sup> September 2016, found that the Judge misapplied Devaseelan and had given inadequate reasons for rejecting the brother's nationality; had not addressed his mind to the significance of the findings in relation to the brother's identity . The decision of Judge Law was set aside to be remade.
8. Thus it was that the matter came for hearing before First-tier Tribunal Judge Davies on 26<sup>th</sup> May 2017. In a determination, notified on 8<sup>th</sup> June 2017, the appeal was allowed. The Judge found on the basis of the relationship with the brother that the claimant was indeed Somali of the sub-clan Midgan and concluded that in the light of the authority of MOJ and Others (Return to Mogadishu) Somalia CG [2014] UKUT 00442 that he was indeed at risk were he to be returned to Mogadishu and accordingly his appeal was allowed on asylum grounds and on human rights grounds.
9. The Secretary of State, in the grounds of challenge to that decision, contends that the Judge failed to engage with the previous determinations and had failed to engage with the issue as to whether the brother had used proper documentation to secure his entry, the suggestion being that the documents that the brother used may not have been accurate and that there was a failure to engage with MA (Disputed Nationality) Ethiopia [2008] UKAIT 0032.
10. It seems to me, having heard Mr McVitie, that there is little merit in such a challenge. The respondent clearly had been satisfied as to the nationality of the brother and of

the documentation presented such that leave to enter the United Kingdom to be with his wife was indeed granted. The brother gave evidence. Indeed he has made a witness statement in which he confirms his nationality, confirms his association with the claimant in Somalia and confirms that he is of the sub-clan Midgan. In those circumstances it was clearly open to a Judge to accept that evidence and to make the findings accordingly. Those findings, and the reasons for those findings, are set out in paragraph 20 of the determination. Though briefly stated I find it is perfectly open to the Judge to have accepted that evidence and made the findings upon it.

11. At the hearing I raised, however, my concerns that the Judge in one brief passage seems to have resolved the issue of risk without a detailed consideration of the elements in **MOJ**.
12. In the head note to the decision, particularly at (1(x)) it was accepted that in the case of a person facing a return to Mogadishu after a period of absence, who has no nuclear family or close relatives in the city to assist him in re-establishing himself on return there will be need to have a careful assessment of all the circumstances. Such considerations will include:- circumstances in Mogadishu before departure; length of absence from Mogadishu; family or clan associations to call upon in Mogadishu; access to financial resources: prospects of securing a livelihood, whether that be employment or self-employment; availability of remittances from abroad; means of support during the time spent in the United Kingdom; why his ability to fund the journey to the west no longer enables an appellant to secure financial support on return.
13. Significantly the Tribunal at (x) said as follows:-

“Put another way it will be for the person facing return to explain why he would not be able to access the economic opportunities that have been produced by the economic boom, especially as there is evidence to the effect that returnees are taking jobs at the expense of those who have never been away”.
14. Although the Judge at paragraph 21 of the determination purports to apply such considerations, the Judge has not gone into the matter in any depth nor set out clear reasons for coming to the various findings which have been made. As indicated to Mr Nicholson and indeed to Mr McVitie I consider that the analysis of **MOJ** was inadequate and that I was of the mind that that aspect of the findings should be reconsidered before the Upper Tribunal to make a full and careful determination as to risk on return and in light of the findings as to nationality.
15. Mr Nicholson submits that that would be fundamentally unfair because it was not a challenge raised in any stage in the proceedings by the respondent. The focus of the challenge and repeated challenge has always been made that the appellant is not of the nationality and clan membership as claimed. It would have been open to the Secretary of State to challenge the substantive findings as to risk but no challenge has been made. Mr Nicholson submits therefore that it would be fundamentally unfair of me to take a point which the respondent could have taken.

16. I note that at the hearing before First-tier Tribunal Judge Davies no Presenting Officer was present. That having been said it was entirely open to the drafter of the grounds of challenge to have put in those grounds a challenge to the substantive findings of fact as to the safety of return which were set out by the Judge.
17. Although the First-tier Tribunal Judge jumps quickly from identifying the factors to a conclusion that the appellant will end up in an IDP camp, such had not found favour with the Court of Appeal in the decision of **Saeed**. It was held that in the case someone with mental difficulties it would be simplistic to conclude without more that they would end up in dire conditions.
18. In one sense of course it is important, as a matter of principle, that decisions on asylum are carefully taken so as to protect the public as well as the individual seeking to claim asylum. It must be recognised that the Secretary of State has a function to safeguard such public interest. She could have been raised such a concern in the grounds of appeal but has not.
19. My function is to determine those issues which are at large between the parties. It is with some reluctance that I have come to the conclusion that, as it is not a specific challenge raised in the course of this appeal to the Upper Tribunal by the Secretary of State, I should conclude matters in this appeal on such issues that are expressly put in issue.
20. For the reasons I have already set out I find that the Judge was entitled to accept the relationship as between the claimant and his brother and to consider that that establishes his Somali origin. The issue of risk of return was not something that was put onto the agenda in the grounds of appeal.
21. Consequently the appeal by the Secretary of State to the Upper Tribunal is dismissed. The decision of Judge Davies of the First-tier Tribunal allowing the appeal in respect of nationality and clan membership stands.

No anonymity direction is made.



Signed

Date 17 January 2018

Upper Tribunal Judge King TD