



**Upper Tribunal
(Immigration and Asylum Chamber)
PA/08411/2017**

Appeal Number:

THE IMMIGRATION ACTS

Heard at Field House

On 8 February 2018

**Decision & Reasons
Promulgated
On 12 February 2018**

Before

**RIGHT HONOURABLE LORD BOYD OF DUNCANSBY
SITTING AS A JUDGE OF THE UPPER TRIBUNAL**

Between

**JOJ
(ANONYMITY DIRECTION MADE)**

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Nicholson, counsel

For the Respondent: Mr Clarke, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Somalia. His date of birth is 1 January 1996. He has refugee status in South Africa. He arrived in the United Kingdom on 20 September 2014 on a fake Tanzanian passport and claimed asylum the same day. The procedural history is set out in paragraphs 12 to 15 but a final decision to refuse his claim was made on 11 August 2017. The appellant appealed that decision to the First-tier Tribunal. Judge Coll refused the appeal in a decision promulgated on 17 October 2017.

2. The appellant's claim is set out in paragraphs 16 to 22 of the decision. Briefly after arriving in South Africa the appellant went to live in Makhibidunga, Limbobo. He went to work in his maternal uncle's shop. On three occasions on 11 June, 4 July and 29 July 2014 armed gangs entered the shop and robbed it. On the first occasion one of the appellant's colleagues was struck on the head with a bottle and died. The police arrived. The first question they asked was about the appellant's status in South Africa. On the second occasion they tried to shoot the appellant's uncle and grazed the top of his arm. The public gathered outside shouting abuse that it was a good thing because they were foreigners. The police arrived three hours after the shop closed. On the third occasion the police did not attend. After the third occasion the uncle decided that it was no longer safe to work in the shop. The appellant left and went to Johannesburg. After a month he left South Africa.
3. The respondent accepted that these events had happened but did not accept that they were racially motivated or that there was insufficiency of protection in South Africa. The appellant produced a volume of objective evidence about conditions for foreigners, particularly refugees living in South Africa together with an expert report from Professor Aguilar.
4. At paragraph 38 Judge Coll said this, *"I accept that the uncle owned a shop in which the appellant worked and that the shop was attacked by gangs or criminals on three separate occasions. I find that neither these gangs or criminals ... or any hostile members of the public who were onlookers were acting on behalf of the state officially or unofficially; the appellant has never said that these gangs, criminals, or onlookers were in any way connected to the authorities. I therefore find that the appellant does not have a Convention reason."*
5. It appears from that passage that Judge Coll was under the misapprehension that in order to claim protection under the Convention the risk of harm must be at the hands of state actors or those connected to the state. As Mr Duffy conceded that is an error of law; **Hovarth v Secretary of State for the Home Department [2001] 1 AC 489**. The question is whether it is material.
6. Mr Duffy submitted that such an error would only be material if it could be shown that Judge Coll had erred in finding that there was a sufficiency of protection or of internal relocation. On the first matter he pointed to paragraph 63 where he submitted that Judge Coll had found that the appellant was not the subject of attack motivated by his nationality or refugee status. It followed that he was not of interest to gangs and criminals and the point had never been made that he was of interest to the authorities. As such he was not in need of international protection. She accordingly did not consider the matter of sufficiency of protection or internal relocation further than she had done already.
7. The issue of whether or not the attacks were motivated by the appellant's ethnicity or status as a refugee in South Africa raises the issue of the appellant's credibility. Judge Coll made an adverse finding on the

appellant's credibility. However there was no doubt that the attacks occurred in the manner described by the appellant. With respect to Judge Coll it appears that the adverse findings on credibility pertain to matters which are peripheral to the question as to whether or not the attacks were motivated by nationality or his refugee status.

8. At paragraph 41 Judge Coll says that the appellant has been able to offer little evidence that these attacks were racially motivated apart from a) his opinion, b) some documents and c) some objective evidence. She accepts that there have been racially motivated attacks on shops owned by the Somali community in South Africa but goes on to say, that this does not mean to say that the attacks on the uncle's shop fitted into that category.
9. Mr Nicholson took me to a number of reports that were before Judge Coll. These included the United States Department of State report, UNHCR, Human Rights Watch and Amnesty International, amongst others. These vouch the problem of attacks on foreigners in South Africa, perceived difficulties in enforcing the law and calls on the authorities to do more to protect foreigners and refugees.
10. There was also an expert report from Professor Aguilar. Judge Coll considers that report in some detail but rejects it. As Mr Nicholson pointed out Professor Aguilar's opinion is consistent with the objective evidence. He referred me to **CM (Kenya) v Secretary of State for the Home Department EWCA Civ 312** in which Buxton LJ observed, *"But if Dr Aguilar's evidence was to be rejected it was in my view incumbent on the tribunal to identify the conflict between Dr Aguilar's evidence and the objective evidence and state at least in outline why it was that the tribunal was rejecting those assertions."* In fact as Judge Coll herself noted the Amnesty International Report 2016/2017 also repeats the kind of objective evidence already before Professor Aguilar.
11. For these reasons I find Judge Coll's rejection of a racial or refugee motive for the attacks on the appellant to be at the very least problematic. It appears that she has sought direct evidence of such motivation on the part of those entering the shop, the perpetrators, as she puts it. That pitches the test too high. There was, of course, evidence of the mob outside on one occasion. There was direct evidence that shops owned by foreigners were targeted by mobs. If the shop was targeted because it was owned by a foreigner, whether it was for economic gain or purely racist, then it is still an attack motivated by racial hatred.
12. The issue then is whether there it can be shown that there is a sufficiency of protection. In my opinion Judge Coll's finding on this issue is infected by her error in considering that in order to claim protection under the Convention the risk of harm must be from state actors or those connected to the state. To that extent I find her error to be material.
13. The issue of internal relocation I find to be more nuanced. Judge Coll deals with this at paragraph 43 and paragraphs 54 to 56. In part her conclusions on this matter rest on her rejection of Professor Aguilar's

report. But I also note that in paragraph 63, having found that the appellant is not in need of international protection she does not require to consider internal relocation any further. On that basis it appears to me that it would at least be open to another judge considering this evidence to reach a different conclusion.

14. For these reasons I find that the error of law is material. I advised parties of my decision at the hearing and it was agreed that the case should be remitted to the First-tier Tribunal for a re-hearing.

Notice of Decision

The appeal is allowed and remitted to the First-tier Tribunal.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date 8 February 2018

Lord Boyd of Duncansby