



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: DA/01203/2013

THE IMMIGRATION ACTS

Heard at Field House

On 16th April 2014 and 11th June 2014

**Determination
Promulgated**

On 25th June 2014

Before

**THE HONOURABLE MR JUSTICE BEAN
UPPER TRIBUNAL JUDGE D E TAYLOR**

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

LIBAN DERIA KHAURE

Respondent

Representation:

For the Appellant: Mr Jarvis, Home Office Presenting Officer

For the Respondent: Mr Toal of Counsel instructed by Brent Community Law Centre

DETERMINATION AND REASONS

1. This is the Secretary of State's appeal against the decision of First-tier Tribunal Judge Callow and Mrs Schmitt JP made following a hearing at Kingston Crown Court on 9th January 2014.

Background

2. The claimant is a national of Somalia born on 1st February 1986. He arrived in the UK on a family reunion visa in July 2007 as the spouse of a refugee, and was subsequently convicted of a sexual assault under Section 3 of the Sexual Offences Act 2003 and sentenced to twelve months' imprisonment at Bristol Crown Court on 12th March 2008. Thereafter he was served with a notice of liability to deportation and he made a claim for asylum.
3. On 3rd June 2008 the Secretary of State made a deportation order by virtue of Section 3(5)(a) of the Immigration Act 1971 on conducive grounds. The claimant appealed against that decision and his appeal was dismissed by what we shall refer to as "the first Tribunal" on 21st October 2008.
4. At that hearing Mr Khaure said that he would be at risk of persecution if returned to Somalia as a member of the Reer-Maanyo clan. He had lived in the Hamarweyne district in Mogadishu and his family were all killed during the civil war when he was about 10 years old. As a consequence he fled the area and went to live in Jilib with his neighbours, before moving to Ethiopia when he was 19 or 20.
5. The first Tribunal disbelieved the claimant's case in its entirety. They noted that he knew little about his clan's leadership, history and origins and found it not credible that, if he had continued to live in Somalia until he was 19 or 20, he would not have basic knowledge about his clan or Mogadishu. They found his evidence to be internally discrepant and discrepant with that of his wife. They were not satisfied that he was from any minority clan, and indeed, given the doubts which they had about his credibility, were not satisfied that he was from Southern or Central Somalia and noted that the Secretary of State believed that he was from Somaliland or Puntland.
6. Before the second Tribunal, in 2014, Mr Khaure accepted that he had lied about when he left Somalia because his wife, Fouzia, who had been accepted as a refugee as a member of the minority clan Reer Hamar, had told the Home Office that she had met him in Somalia and she had only been in Ethiopia for a short time. He now claimed that in 1994 or 1995 his family were killed in a bomb attack and he was taken into the care of neighbours who fled for Jilib in Southern Somalia where they stayed for about a year before moving to Ethiopia. It was there that he met his future wife. He had only said that he had stayed in Somalia until he was in his late teens because he did not want to contradict Fouzia's earlier evidence. He did however continue to maintain that he was a member of the Reer-Maanyo clan.
7. The second Tribunal reminded themselves that it was necessary to make credibility findings on the evidence. They cited the decision of Devaseelan v SSHD [2002] UKIAT 000702 and summarised the guidelines set out in that case. They said that in assessing the claimant's credibility they took

account of his background and the assessment of Dr Green, a clinical psychologist, who in a report dated 24th July 2011 concluded that he was a vulnerable person.

8. They then wrote as follows:-

“For his part the Appellant has openly confessed to having lied when making his claim for asylum and proceeding with his appeal in 2008 and it is from this standpoint that he resolved to tell the truth about his background and circumstances that led to him fleeing Somalia in the manner that he did in proceeding with the present appeal. Mindful of the low standard of proof and the situation that prevailed in Somalia after the outbreak of war in 1991 we accept that the facts summarised at paragraph 16 above have been established, save that the Appellant is the member of a minority clan. It is accepted that he has given an explanation as to why he has limited knowledge of his clan on the premise that he left Somalia earlier than he had previously said. The weight to be attached to the Sprakab linguistic report has not been placed in issue. This report summarised at paragraph 17(f) above, refutes the Appellant’s claim to be a member of Reer-Maanyo, a sub-clan to the Reer-Hamar. As it has not been established that the Appellant is the member of a minority clan it has not been established that he would be at risk of persecution or a real risk of serious harm. To this extent the Appellant is not entitled to protection under the Convention. Whilst it might be said to be a fact sensitive decision we are guided by the decision in KAB in which it was held that the situation in Mogadishu, by contrast to that when deciding the case of Sufi and Elmi, no longer gave rise to a real risk of treatment contrary to Article 3 arising from mere presence. It is noted that the European Court was not considering Article 15(c) in KAB.”

9. The second Tribunal applied the country guidance case of AMM and others (conflict; humanitarian crisis; returnees; FGM) Somalia CG [2011] UKUT 00445 and said that the background evidence showed that there continued to be indiscriminate and targeted attacks within Mogadishu. They dismissed the appeal on asylum grounds and under Articles 3 and 8 of the ECHR, but allowed the appeal under Article 15(c).

The Grounds of Application

10. The Secretary of State sought permission to appeal on the grounds that the judge had erred in law in failing to consider that the findings in KAB v Sweden (application number 886/11) were persuasive, and had misdirected themselves in failing to state why the factual findings made by the European Court were not of relevance when it was arguable that they provided a material development in the country situation in Somalia, particularly in relation to Al-Shabab’s lack of control in Mogadishu.

11. Permission to appeal was granted by Designated Judge Zucker on 21st March 2014 who observed that whilst as a general proposition judges are encouraged to follow country guidance cases it was arguable, given the findings in KAB, that the panel was required to look at the extent to which, if at all, the available background material pointed to the need to depart from the country guidance case of AMM rather than simply make the distinction appearing in the last sentence of paragraph 33 of the determination.

The Hearing on 16th April 2014

12. Both parties made extensive submissions in relation to the potential error of law as identified in the grounds and the grant of submission.
13. By an application filed just before the hearing, Mr Jarvis sought permission from us to amend his grounds and to challenge the determination on the basis that there had been a material misdirection in law in the application of Devaseelan.
14. We agreed to allow the amendment, but since Mr Toal had not had time to prepare his case on that basis, it was agreed that the matter be adjourned to be resumed on 11th June 2014.

The Secretary of State's Case

15. Mr Jarvis submitted that the FTT did not accurately summarise the principles of Devaseelan applicable to the appeal, and failed to make lawful findings when purporting to apply it.
16. He relied in particular on Guideline 4 which states that:-

“Facts personal to the Appellant that were not brought to the attention of the first Adjudicator, although they were relevant to the issues before him should be treated by the second Adjudicator with the greatest circumspection.”
17. Firstly, he argued, the panel did not refer to the need for greatest circumspection and did not properly summarise the longstanding guidance of the IAT. The claimant now states that he was not in Somalia between the ages of 10 and 20 but in Ethiopia; his present case, that he had lied before the first Tribunal but was telling the truth now, should have been approached with caution.
18. Second, the FTT did not properly apply Devaseelan when making their findings. Simply to state that “the low standard of proof applies” is not a finding and not a lawful approach to the care required in a case of this type where the factual issues have already been decided by the AIT in

2008. It was imperative, for example, that the Tribunal make clear findings about whether the claimant's house had been destroyed. No reasons at all were given for rejecting the myriad of adverse credibility points raised against him.

19. Third, the judge failed to make lawful findings in respect of the absence of the wife at the 2014 hearing. The FTT was obliged to engage with her absence as part of their consideration of the claim.
20. Fourth, the FTT had failed to make lawful findings in respect of a number of matters, including the expert evidence, which was inconsistent with the claimant's evidence before the initial Tribunal, and, whilst the evidence from Sprakab was that his dialect matched that of Mogadishu, the judge made no reference to it.

The Claimant's response

21. Mr Toal submitted that there was no misapplication of the Devaseelan principles. The core facts relied upon by the claimant were the same as those which he brought to the attention of the First-tier Tribunal. In any event, the failure to summarise an authority did not establish that the judge had misunderstood the applicable principles.
22. It should be assumed that, absent any demonstration otherwise, that the judge knew what he was required to do. He relied on Piglowsaka [1999] WLR 1360 at 1372G where Lord Hoffman stated that a judge's decision is to be read:-

“on the assumption that, unless he has demonstrated the contrary, the judge knew how he should perform his functions and which matters he should take into account ... An appellate court should resist the temptation to subvert the principle that they should not substitute their own discretion for that of the judge by a narrow textual analysis which enables them to claim that he misdirected himself.”

23. He also relied on the leading decisions in Eagle Trust Company Ltd v Pigott-Brown [1985] 3 All ER 199, English v Emery Reimbold & Strick Ltd 1 WLR 2409; [2002] EWCA Civ 605, and RH (Ghana) v SSHD [2007] EWCA Civ 640 which held that:-

“... it is not required of a tribunal of fact, particularly one that has heard witnesses, to say more than that it fully accepts the evidence of the one witness.”

24. He accepted the first proposition of the Devaseelan guidelines that the first Adjudicator's determination should always be the starting point and submitted that this was exactly what the judge in this case had done. The Tribunal had in mind the adverse factual findings made by the first

Tribunal hearing the previous appeal, but subsequently identified a number of matters, upon which it was entitled to rely, to reach different findings of fact to them.

25. Those matters include the claimant's confession that he had lied when he made his asylum claim at the behest of his wife. Dr Green had produced a compelling report which was capable of placing a different complexion on his evidence, stating that he had significant difficulties in his intellectual functioning and sought to cope with them by having others develop coping strategies for him. It provided a psychological basis for his conduct at the time of his first appeal, i.e his lying on the advice of his wife, and an alternative explanation for the deficiencies in his testimony. The Tribunal was entitled to rely on this as a basis for departing from the conclusions of the first Tribunal. The adverse credibility findings made by the first Tribunal lose their force if it was accepted that the claimant left Mogadishu when he was 10 years old.
26. With regard to the Sprakab Report, he submitted that this was cogent evidence that the claimant was from Mogadishu as claimed and cast significant doubt on the conclusions of the first Tribunal which was not satisfied that the claimant was from Southern or Central Somalia. It was compelling evidence that the deficiencies in his evidence did not in fact provide a reliable basis for drawing adverse inferences as to his truthfulness.

Our Conclusions

27. We find that the Secretary of State's submissions are made out, and the second Tribunal erred both in their application of Devaseelan and because the determination is not adequately reasoned.
28. First, paragraph 33 of the determination, cited above, does not demonstrate that the second Tribunal had in his mind that the previous findings of the first Tribunal were their starting point. Simply citing Devaseelan is not a demonstration that its principles have been taken into account. The panel did not begin their consideration of the evidence on the basis that the claimant was a person who had been found almost entirely incredible by a previous Tribunal. The facts had already been adjudicated upon. It should be noted that the main finding of the first Tribunal was that the claimant had lied about this clan membership, and he continued to maintain the lie before the second Tribunal.
29. What the panel should have done was to take each of the previous findings and to state whether there was any basis for departing from them and if so, to give reasons.
30. It is true that the claimant's case before the second Tribunal, that he told lies at the behest of his wife and that he left Somalia when he was a child, is an explanation for his inability to give any detail about his clan membership and is capable of producing a different conclusion. However,

there is no analysis of the original determination, and the fresh evidence now before them, and no consideration of how it might produce another result.

31. Moreover, it is difficult to understand why the report of Dr Green, which deals with the claimant's propensity to reoffend, his low intellectual capacity and his ability to cope on return to Somalia, could be a proper basis for departing from the findings of the first Tribunal. Whilst Dr Green's report is potentially supportive of the claimant's case that he lied about timing at the behest of his wife, it is not an adequate basis for a finding that he was telling the truth about the remainder of his claim.
32. The Sprakab Report is evidence that he comes from the Mogadishu area, but says nothing about the circumstances of his life there, and was not in fact relied upon by the panel as evidence that his account of having lost his family in a bomb explosion in Mogadishu when he was a child was true, but to show that he was not being truthful about his membership of a minority clan.
33. Second, it is not possible from this determination to understand why the Tribunal found in the claimant's favour in respect of his account of what happened to him there. There was no analysis of the constituent parts of the claim.
34. The Tribunal in AMM did not find that every resident of Mogadishu was subject to Article 15(c) risk, although at that time, for most people in Mogadishu there was such a risk. However, it is only on the basis of proper findings of fact that an assessment of risk on return can be made, including Article 15(c) risk.
35. For the above reasons, the decision is set aside. It is therefore not necessary to deal with the arguments in relation to whether there was an error of law as originally pleaded by the Secretary of State.
36. We indicated our decision at the conclusion of the oral hearing. Both parties were in agreement that the proper course would be for this matter to be remitted to the First-tier Tribunal, which in making its findings of fact will take as its starting point the determination of 2008. The Tribunal will then consider whether any subsequent evidence, including the evidence of Dr Green and the Sprakab Report and any further oral evidence from the claimant, should lead them to depart from the 2008 findings.
37. We are aware that a country guidance case dealing with the present situation in Somalia is to be promulgated very shortly and this appeal should therefore be listed after the promulgation of that case. Listing directions are attached. We take the view that the Tribunal should be freshly constituted.

Signed

Date

Upper Tribunal Judge Taylor