



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: AA/03344/2014

THE IMMIGRATION ACTS

Heard at Field House
On 19 August 2015

Determination Promulgated
On 14 September 2015

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL ARCHER

Between

YF
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms M Thirumaney, Solicitor, of Shervins Solicitors

For the Respondent: Mr Ian Jarvis, Senior Home Office Presenting Officer

DECISION AND REASONS

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) I make an order prohibiting the disclosure or publication of any matter likely to lead members of the public to identify the appellant. Breach of this order can be punished as a contempt of court. I make the order because the appellant is a young asylum seeker who might be at risk just by reason of being identified.

2. The appellant appeals against the decision of the First-tier Tribunal dismissing the appellant's appeal on asylum and human rights grounds against a decision taken on 29 April 2014 refusing to grant him asylum and to remove him from the UK.

Introduction

3. The appellant claims to be a citizen of Somalia born in 1988. He claims to be a member of the minority Ashraf Reer Hamar ethnic group in Somalia. His father owned a shop which was repeatedly raided by the Hawiye clan militia and in 1997 the father was killed by them. The appellant and his mother then moved with his sister to Luuq. He then attended a Quranic school from 1998. His mother was killed in 2000 by Hawiye clan militia. His cousin, J, took him in. After two weeks he organised for the appellant to travel to Mombasa. He then lived in Kenya for eight years and attended a mosque school with other Somali children.
4. The appellant claims that he left Kenya in 2008 after Jama had saved \$5000 to pay an agent. In July 2008 the appellant travelled by lorry from Kenya to Tanzania to the British embassy in Dar es Salaam. He was fingerprinted but not interviewed and believes that he was issued with some form of UK visa. He travelled by plane to the UK via Ethiopia in August 2008. He then lived and worked for the agent in the UK for three years in East London, earning £10-£20 per week. In 2011 he was taken to Bristol to work.
5. Around August 2012 the appellant lost his job and the agent told him that he could no longer support him. The appellant approached members of the Somali community and they helped him to find a cousin in the UK, S. S has been accepted as a Somali national of Ashraf ethnicity and granted refugee status. He helped the appellant to claim asylum on 29 October 2012.
6. The respondent accepted that the appellant spoke Somali but he is a match to a visa issued as a citizen of Tanzania which means that during the visa application he was accepted as a citizen of Tanzania. A language analysis conducted by Sprakab found that the appellant did not speak any variety of Somali spoken in south Somalia. He also had incorrect and non-detailed knowledge of Luuq and Somalia. The respondent did not accept that the appellant was a citizen of Somalia and has issued removal directions for Tanzania.

The Appeal

7. The appellant appealed to the First-tier Tribunal and attended an oral hearing at Taylor House on 21 January 2015. The judge dismissed his appeal, making a series of adverse credibility findings and relying upon the Sprakab evidence. There was no documentary evidence to corroborate S's claim to be the appellant's paternal cousin.

The Appeal to the Upper Tribunal

8. The appellant sought permission to appeal on 10 March 2015. A DNA test was included in the appellant's bundle before the First-tier tribunal, showing that there

was a 99.92% probability that S and the appellant were paternal cousins. The judge's findings regarding the reliability of S's evidence were unsafe and should be set aside.

9. Permission to appeal was granted by Upper Tribunal Judge Blum on 28 May 2015 on the basis that it appeared that the judge failed to consider the DNA evidence which strongly suggested the appellant and S were indeed cousins. It was arguable that had the judge taken account of the DNA evidence then she may have reached a different conclusion in respect of the appellant's nationality.
10. In a rule 24 response dated 10 June 2015, the respondent sought to uphold the judge's decision on the basis that the DNA evidence was not capable of providing proof of the appellant's nationality, particularly in light of the numerous findings on that matter. The relationship was not a crucial finding and consideration of the DNA evidence was not capable of changing the outcome of the appeal.
11. Thus, the appeal came before me.

Discussion

12. Ms Thirumaney submitted that the two key points were the DNA evidence and the undue weight attached to the Sprakab report. The appellant is a Somali national and the reference to an absence of documentary evidence to prove the claimed paternal cousin relationship means that the assessment of an important part of the claim is fundamentally flawed and that is a material error of law. The Tribunal should not use the Sprakab report to pre-judge the case. The basis at paragraph 25 of the decision is solely on the Sprakab report to find that the appellant is not a Somali national. Undue weight was placed on the Sprakab report which clouded the judge's considerations to the extent that she did not even notice the DNA evidence. There was an error on key matters and the decision is not sustainable.
13. Mr Jarvis submitted that there is a raft of adverse credibility findings in the decision, not just reliance on the Sprakab report. The appellant relied upon the Tanzanian passport and the judge was entitled to make findings about that. The appellant has had the opportunity to rebut the assertions in the Sprakab report by way of background evidence but has chosen not to do so. Permission to appeal was not granted in relation to the rejection of Dr Mullen's evidence submitted on behalf of the appellant. The DNA evidence is a red herring because most people have relatives of a different nationality. The real question is why the appellant had a Tanzanian passport and the judge rejected his explanation. Paragraph 27 of the decision carefully assesses the evidence of Said. At its highest, the absence of any reference to the DNA evidence is not material; it is almost inevitable that the appellant as an ethnic Somali would have a Somali national relative.
14. Ms Thirumaney replied that the judge was clouded by the Sprakab report and then failed to take into account other material evidence. If the judge had opened her mind to the DNA evidence then the outcome of the nationality assessment might have been different. The appellant's explanation about the Tanzanian passport was dismissed in a cursory way.

15. I find that Upper Tribunal Judge Blum did not grant permission to appeal in relation to the ground that the judge erred in law by attaching less weight to an expert report from Dr Mullen dealing with the appellant's nationality because Dr Mullen conducted his interview over the telephone whereas the Sprakab report was also conducted over the telephone. In fact, the judge gave cogent reasons for attaching less weight to the report from Dr Mullen and no material error of law arises from the judge's handling of the expert evidence. Permission to appeal would not have been granted at all were it not for the overlooked DNA evidence. That does not mean that the judge's assessment of the expert evidence would not have been wholly different if the DNA evidence had been properly considered.
16. I reject Mr Jarvis' submission that the DNA evidence could not have altered the outcome of the appeal and therefore any error was not material. The DNA evidence proves that a significant aspect of the appellant's account is true; i.e. that he and S are paternal cousins. This is a case involving delicate considerations of competing evidence. The judge found that the appellant used what was regarded by the British embassy as a genuine Tanzanian passport issued to him in 2005 (paragraph 21 of the decision), gave vague answers during his asylum interview relating to why he failed to leave Kenya earlier when the passport he travelled on was issued in 2005 (paragraph 21) and displayed little knowledge of Luuq where he claimed to live and Somalia in general (Sprakab report, paragraph 25) and spoke Somali with an accent and grammar found in Kenya, Tanzania and Uganda rather than Somalia (paragraph 25).
17. The judge reinforced those negative findings by placing limited weight on the expert report from Dr Mullen (paragraph 26) and stating at paragraph 26 that, "*Despite the appellant's claim that he is the first cousin of (S), a Somali citizen, both witnesses had distinctly different racial features. (S) said that the reason they looked different is because their fathers who he claimed were brothers also looked different ... I attach limited weight to his evidence which I do not find credible. I find that he has attempted to convey the appellant as a Somali national to support his claim for asylum. There is no documentary evidence to support his claim to be the appellant's paternal cousin*". The basis of the finding that S was not a credible witness falls away in light of the DNA evidence and I find that the actual relationship between S and the appellant is critical to the appellant's case. Despite the valiant efforts of Mr Jarvis, the respondent's case and the judge's findings have never been made on the basis that the appellant and S were paternal first cousins who were somehow brought up in different countries. I find that the inadvertent failure to consider the DNA evidence is a material error of law which has prevented the judge from properly balancing the competing evidence in this case.
18. I have considered paragraph 51 of SSHD v MN & KY [2014] UKSC 30. There is no reason in principle why Sprakab should not be able to report on both (a) language as evidence of place of origin and (b) familiarity with claimed place of origin provided in both cases, their expertise is properly demonstrated and their reasoning adequately explained. Acceptable expertise and method can properly be accepted **unless the evidence in a particular case shows otherwise**. The tribunal ought to give further consideration to how the basis for the geographical attribution of particular

dialects or usages can be better explained and not be left implicit. The tribunal needs to be able to satisfy itself as to the data by reference to which analysts make judgments on the geographical range of a particular dialect or usage. In relation to familiarity, the report needs to explain the source and nature of the knowledge of the analyst on which the comments are based and identify the error or lack of expected knowledge found in the interview material.

19. It is clear that the weight given to Sprakab reports must be carefully assessed on a case by case basis and that process may be influenced by other evidence, such as the DNA evidence in this case. The fact that the judge gave cogent reasons for preferring the Sprakab report from the expert report of Dr Mullen is not decisive. The material error of law in this case infects the whole of the decision including the weight to be placed upon competing expert evidence. Thus, the First-tier Tribunal's decision to dismiss the appellant's appeal involved the making of errors of law and its decision cannot stand.

Decision

20. Both representatives invited me to order a rehearing in the First-tier Tribunal if I set aside the judge's decision and took the view that the DNA evidence went to the heart of the case. Bearing in mind paragraph 7.2 of the *Senior President's Practice Statements* I consider that an appropriate course of action. I find that the errors of law infect the decision as a whole and therefore the re-hearing will be *de novo* with all issues to be considered again by the First-tier Tribunal.
21. Consequently, I set aside the decision of the First-tier Tribunal. I order the appeal to be heard again in the First-Tier Tribunal to be determined *de novo* by a judge other than the previous First-tier judge.

Signed



Date 12 September 2015

Judge Archer
Deputy Judge of the Upper Tribunal