



**Upper Tribunal
(Immigration and Asylum Chamber)
AA/02649/2015**

Appeal Number:

THE IMMIGRATION ACTS

**Heard at Field House
On 29 February 2016**

**Decision & Reasons
Promulgated
On 29 April 2016**

Before

UPPER TRIBUNAL JUDGE FINCH

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

-And-

A A G

(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Ms A. Brocklesby-Weller, Home Office Presenting Officer
For the Respondent: Miss N. Patel of counsel, instructed by Irvine Thanvi Nata
Solicitors

DECISION AND REASONS

History of Appeal

1. The Respondent, who was born on 15 February 1990, is a national of Somalia. He entered the United Kingdom with his mother and siblings in

1998. His mother applied for asylum. Her application was refused but on 20 December 2000 she and her children were granted exceptional leave to remain until 13 December 2004. Then on 3 August 2005 the Respondent, his mother and his siblings were granted indefinite leave to remain in the United Kingdom.

2. On 25 May 2010 the Respondent was convicted on three counts of attempting to cause grievous bodily harm with intent, one count of causing grievous bodily harm with intent and one count of dangerous driving. On 18 June 2010 he was sentenced to 6 years and 6 months detention in a young offender institute. He was notified of his liability to deportation on 10 August 2010 and on 13 May 2013 he was served with a deportation order, dated 3 May 2013, pursuant to section 32(5) of the UK Borders Act 2007.
3. He appealed on asylum grounds and was interviewed about his application on 15 February 2013 and released on bail on 22 March 2013.
4. On 17 March 2014 First-tier Tribunal Judge Dean allowed his appeal on the basis that his deportation would breach Articles 2 and 3 of the European Convention on Human Rights. However, First-tier Tribunal Judge Dean also found that he continued to remain a danger to the community and that he had not rebutted the presumption contained within section 72(2) of the Nationality, Immigration and Asylum Act 2002 and, therefore, he was excluded from protection under the Refugee Convention. The Secretary of State for the Home Department appealed against this decision and Upper Tribunal Judge Storey granted her permission to appeal on 2 May 2014. However, on 1 August 2014 Upper Tribunal Judge Warr found that there was no error of law in First-tier Tribunal Judge Dean's decision. The Secretary of State for the Home Department sent a letter applying for permission to appeal to the Court of Appeal on 9 October 2014 but Upper Tribunal Judge Warr refused her permission on 3 November 2014.
5. The Appellant did not revoke the Respondent's deportation order and on 10 December 2014 she made a further decision to deport him from the United Kingdom. Submissions were made on the Appellant's behalf on 22 December 2014 and on 2 February 2015 the Appellant served the Appellant with a decision refusing his protection and human rights claim. He was also put on notice that Section 72 of the Nationality, Immigration and Asylum Act 2002 applied, as he had been previously sentenced to at least two years imprisonment.
6. The Respondent appealed on 16 February 2015 on the basis that his deportation would give rise to breaches of Articles 2, 3 and 8 of the European Convention on Human Rights and the Refugee Convention. He also submitted that it was an abuse of process for the Appellant to issue a second deportation decision after his previous appeal had been allowed by the Tribunal.
7. First-tier Tribunal Judge Clarke allowed the Respondent's appeal on 13 November 2015 and the Appellant appealed against his decision on 3

December 2015. First-tier Tribunal Judge Brunnen extended time to appeal and granted the Appellant permission to appeal on 15 December 2015. The Respondent filed a Rule 24 response on 20 January 2016.

Error of Law Hearing

8. The Home Office Presenting Officer said that she relied on the Secretary of State for the Home Department's grounds of appeal and the fact that *MOJ & Others (Return to Mogadishu) Somalia CG* [2014] UKUT 00442 (IAC) had not been promulgated at the time First-tier Tribunal Judge Dean decided to allow the Respondent's appeal. She also submitted that it was the fact that the material and information referred to in *MOJ* had been analysed and scrutinised by the Upper Tribunal which meant that it represented a change in circumstances. In addition, she submitted that the promulgation of *MOJ* gave rise to a change in the law and noted that the Practice Directions for the Immigration and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal stated country guidance cases are binding on First-tier Tribunal judges unless there is a reason to depart from them. She also relied on the wealth of evidence and the expert evidence which was before the Upper Tribunal before it reached its decision in *MOJ* and which was not before First-tier Tribunal Judge . She submitted that *K.A.B. v Sweden* (Application No. 886/11) did not go as far as *MOJ* and that much changed since it was decided.
9. She further submitted that *MOJ* was a weighty decision by the Upper Tribunal and was at the same level as starred decisions. She relied on the fact that it remained conducive to the public good to deport the Respondent and that once there had been a change of circumstances there was no longer any barrier to the Respondent's deportation. She confirmed that the Respondent's deportation order was still in place and that his indefinite leave to remain had not been revoked.
10. Counsel for the Respondent then replied. She relied on the minute by a senior case worker, dated 25 March 2013, which was at Tab 2 of the Respondent's Bundle. The minute indicates that prior to a deportation order being made in relation to the Respondent on 3 May 2013, the Appellant believed that the evidence about Somalia indicated that the country guidance in *AMM and others (conflict; humanitarian crisis; returnees; FGM) Somalia CG* [2011] UKUT 445 (IAC) should no longer be followed. She then relied on *Secretary of State for the Home Department v TB (Jamaica)* [2008] EWCA Civ 977 and the need for finality in litigation. She stressed that this was even more important in a jurisdiction where there was no issue estoppel.
11. Counsel for the Respondent then addressed the issue of the status of country guidance decisions and noted that they were authoritative but not binding. She also submitted that country guidance cases cannot be "binding" in the convention sense as they had to strike an appropriate balance between consistency in decision making and the fact that they needed to be flexible enough to be fair. Therefore, a new country guidance

case did not amount to a change in the law. She also addressed me about the evidence which was before First-tier Tribunal Judge Dean.

12. After the hearing counsel for the Respondent submitted further written submissions, dated 2 March 2016, despite my not having made directions for any such additional submissions. As a consequence, I directed that they be served on the Home Office Presenting Officer and she responded in writing on 21 April 2016; the delay being occasioned by the Respondent's submissions not being filed on her promptly.

Error of Law

13. In paragraph 27 of *Secretary of State for the Home Department v TB (Jamaica)* [2008] EWCA Civ 977 Lord Justice Stanley Burnton found that "the principles requiring finality in litigation, and that a party should not be vexed twice, exemplified by *Henderson v Henderson* (1843) 3 Hare 100 and *Johnson v Gore Wood* [2002] 2 AC 1, are applicable in public law as in private law. Just as applicants in asylum and immigration cases are required to put forward all the matters on which they rely by the "one-stop" warning which they are given, so must the Secretary of State bring forward his entire case when an applicant applies to the AIT".
14. In paragraph 32 he also found that "as a matter of principle, it cannot be right for the Home Secretary to be able to circumvent the decision of the IAT by administrative decision. If she could do so, the statutory appeal system would be undermined".
15. I accept that in paragraph 35 of *TB (Jamaica)* Lord Justice Stanley Burnton found that "different considerations may apply, where there is relevant fresh evidence that was not available at the date of the hearing, or a change in the law [or] a change in circumstances". I find that, as submitted by counsel for the Respondent, that these are narrow exceptions.
16. The Appellant submitted that the promulgation of *MOJ* amounted to a change in the law. However, section 107(3) of the Nationality, Immigration and Asylum Act 2002 states that practice directions may require the Upper Tribunal to treat a specified decision of the Tribunal as authoritative of a particular matter. Paragraph 12.2 of the Practice Directions of Immigration and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal states that "reported determinations of the Tribunal, the AIT or the IAT bearing the letters "CG" shall be treated as an authoritative finding on the country guidance issue identified in the determination, based upon the evidence before the members of the Tribunal, the AIT or the IAT that determine the appeal As a result, unless it has been expressly superseded or replaced by any later "CG" determination, or is inconsistent with other authority that is binding on the Tribunal, such a country guidance case is authoritative in any subsequent appeal, so far as that appeal:-
 - (a) relates to the country guidance issue in question; and
 - (b) depends upon the same or similar evidence".

17. Therefore, I find that country guidance cases are authoritative in relation to the evidence available at that particular point in time about an individual country.
18. This approach was approved in paragraph 12 of *SA (Sri Lanka) v Secretary of State of the Home Department* [2014] EWCA Civ 683, where Lord Justice Patten held that “country guidance decisions whilst determining the rights of the parties to the actual decision, are no more than a compilation and statement of evidence relevant to the position of asylum seekers from the country in question. They therefore provide a convenient guide to the likely treatment of asylum seekers in that jurisdiction but they are no more than a judicial assessment of the probative value of the evidence on which they are based and are not intended to exclude other relevant evidence which the parties in particular cases are able to adduce.....A change in country guidance is in no sense a change in the law”.
19. In paragraph 140 of *NM and Others (Lone women - Ashraf) Somalia CG* [2005] UKIAT 00076 the Upper Tribunal also held that country guidance decisions “are now denoted as “CG”. They are not starred decisions. Those latter are decisions which are binding on points of law. The requirement to apply CG cases is rather different: they should be applied except where they do not apply to the particular facts which an Adjudicator or the Tribunal faces and can properly be held inapplicable for legally adequate reasons...The system does not have the rigidity of the legally binding precedent but has instead the flexibility to accommodate individual cases, changes, fresh evidence and other circumstances which we have set out.
20. At paragraph 17 of *R on the application of Saribal v Home Secretary* [2001] EWHC 1542 (Admin) Moses J found that there is an important principle at the heart of these proceedings which is that the Respondent is not entitled to disregard the determination of the IAT and refuse a claimant’s right to ILR as a refugee unless he can set aside that determination by appropriate procedure founded on appropriate evidence.
21. In her further written submissions the Home Office Presenting Officer submitted that a country guidance case amounted to a binding precedent in law even if it did not amount to a change in the law. She further submitted that First-tier Tribunal Judge Dean was obliged to follow *MOJ*. However, as made clear in paragraph 10 of his decision, the issue before him was whether the further decision was an abuse of process. Until that issue had been resolved there was no new decision to which *MOJ* applied. Therefore, I find that First-tier Tribunal Judge Clarke was correct to find that the promulgation of *MOJ* did not amount to a change in the law or a binding precedent in law.
22. In the alternative, the Appellant had submitted that the promulgation of *MOJ* amounted to a “change in circumstances”. However, First-tier Tribunal Judge Dean had been provided with a copy of *KAB v Sweden* and in paragraph 87 the European Court of Human Rights found that “the most recent information suggests that the security situation in Mogadishu has improved since 2011 or the beginning of 2012”. In paragraph 88 it also

found that “the sources appear to agree that the general level of violence in the city has decreased” and in paragraph 91 it found that “the available country information does not indicate that the situation is, at present, of such a nature as to place everyone who is present in the city at real risk of treatment contrary to Article 3 of the Convention”.

23. First-tier Tribunal Judge Dean also had a copy of the Operational Guidance Note on Somalia, dated September 2013, which said that “since the determination of *AMM and others* was handed down there has been a sustained and significant improvement in the situation in Mogadishu and case owners should consider the new country of origin information and the individual circumstances of each claimant to establish whether the guidance contained in *AMM* in relation to internal relocation to Mogadishu remains applicable to the individual claimant concerned”.
24. Counsel for the Respondent also relied on a note by a senior case worker, dated 25 March 2013. This stated that “case law since *AMM and others* [2011] had been taken into account and country of origin information has been used to show that there has been significant change in Mogadishu since *AMM* was promulgated which has led to a vast improvement in the security situation there”. I find that this indicates that First-tier Tribunal Judge Dean was well aware that there had been a change of circumstances in Mogadishu when he allowed the Respondent’s appeal.
25. The Appellant relied on the fact that there was additional information, including expert evidence, before the Upper Tribunal in *MOJ*. However, the Home Office Presenting Officer did not refer to any of this evidence in particular to show that the situation in Mogadishu, at the date of the promulgation of *MOJ*, had significantly changed from that when *KAB v Sweden* was decided or the OGN published. She argued that *MOJ* provided the Secretary of State for the Home Department with additional analysis but I find that this did not alter the fact that the evidence before First-tier Tribunal Judge Dean about the situation in Mogadishu had been substantially the same as that before the Upper Tribunal in *MOJ*.
26. The Secretary of State for the Home Department was a party to *MOJ* and it is clear that the relevant evidence she relied upon in that case could also have been submitted in the appeal before First-tier Tribunal Judge Dean. I remind myself that in paragraph 20 of *Chomanga (binding effect of unappealed decisions) Zimbabwe* [2011] UKUT 00312 (IAC) the Upper Tribunal found that “the respondent had had the opportunity of filing evidence in support ...but had failed to do soBy making a further decision by relying on evidence which could and should have been produced at the hearing, the respondent was in substance attempting to circumvent the judge’s decision”.
27. In the current case, the Appellant could have sought to permission to rely on *MOJ*, when she sought permission to appeal to the Court of Appeal, but failed to do so. In particular, as was noted by counsel for the Respondent, the Appellant could have sought to rely on *E v Secretary of State for the Home Department* [2004] EWCA Civ 49 but had not done so. Such an

application would have been consistent with her current assertion that new country guidance cases can be said to amount to a change in circumstances. The fact that she chose not to do so also offended against the principle of finality upheld in *TB*.

28. I have also reminded myself of the decision in *Greenwood (No 2) (para 398 considered)* [2015] UKUT 629 (IA) and note that First-tier Tribunal Judge Clarke correctly made a decision that the Appellant's decision was unlawful in public law terms.
29. As a consequence of all of the above, I find that First-tier Tribunal Judge Clarke did not make any errors of law in his decision.

Decision

1. I dismiss the Appellant's appeal.
2. I uphold First-tier Tribunal Judge Clarke's decision to allow the Respondent's appeal against the decision, dated 20 January 2015.

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: 25 April 2016

Nadine Finch

Upper Tribunal Judge Finch

