



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

Appeal Number:
AA/10612/2014

THE IMMIGRATION ACTS

Heard at: Manchester

On: 23rd February 2016

**Decision & Reasons
Promulgated
On 17th May 2016**

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

**NMA
(anonymity direction made)**

Appellant

and

Secretary of State for the Home Department

Respondent

For the Appellant:
For the Respondent:

Mr Hussain, Lei Dat & Baig Solicitors
Mr Harrison, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellant is a national of Somalia born in 1988. She appeals with permission¹ the decision of the First-tier Tribunal (Judge Nicol) to dismiss her appeal, on asylum and human rights grounds, against the Respondent's decision to remove from the United Kingdom pursuant to s10 of the Immigration and Asylum Act 1999.

¹ Permission granted by First-tier Tribunal Judge Reid on the 10th June 2015

Background

2. The Appellant arrived in the United Kingdom on the 27 November 2013 and claimed asylum the next day. She claimed to have a well-founded fear of persecution in Somalia on the grounds that she was from the Shekhal minority clan. She was at risk from Al-Shabaab. Her family, including her husband, had all disappeared and she had no-one. She was seven months pregnant on arrival.
3. The Respondent required the Appellant be subject to a language analysis. The results indicated that she was not from Kismayo as she claimed, but in fact from the north-west of Somalia, Somaliland, Djibouti or Ethiopia. This, and the Appellant's poor knowledge of Kismayo, led the Respondent to reject the credibility of the Appellant's account, including her claim to be Shekhal and consequently at risk from Al-Shabaab.
4. By the time that the matter came before the First-tier Tribunal the Appellant's case had developed. Although she maintained her claim to be from the south, she had commissioned a report from country expert Marcus Hoehne, who was not satisfied as to her claimed clan or place of origin being Kismayo. He thought it more likely that she was from the north of the country. Her representative relied upon that report to submit that *if* the Appellant was from the north then she would face a real risk of harm in the strange city of Mogadishu, which is where she would be returned to. She would have no family support and would face a risk of indiscriminate violence from militias preying on lone women, including Al-Shabaab. A second limb of her case was that since her arrival in the United Kingdom she had given birth to two children. The first she was carrying on arrival. The second was born as a result of a relationship she had here with her cousin, who is now a British national. That child had been born out of wedlock and as a result the Appellant had incurred the hostility of her (and his) family. The presence in the United Kingdom of the child's British father further gave rise to Article 8 issues.
5. Although the First-tier Tribunal accepted that the Appellant is Somali (in light of an apparent concession by the Respondent - see paragraph 32) the determination rejected the Appellant's claim to be Shekhal, to be from the south of Somalia, or to be at any risk there from Al-Shabaab. At paragraph 38 it says the following:

"The expert evidence shows that Mogadishu is probably a safe place to return to but that support may be required. I do not find the Appellant's evidence concerning her family and background credible. In the absence of any credible evidence I do not accept that she would be unable to find

support in Mogadishu or, at the very least, make contact with those elsewhere who could help support her. I therefore do not find that she would be at risk if she were to be returned to Somalia generally or Mogadishu in particular”.

6. As to the second limb of the case, the Tribunal found that it would be in the best interests of both children to go to Somalia with their mother.

Error of Law

7. The grounds of appeal are as follows:

- i) The Tribunal has erred in its characterisation, or understanding, of the expert evidence. The report in fact read “NMA would most probably be lost in Mogadishu”; it is submitted that the expert evidence about instability in Mogadishu was such that the Appellant’s family would not be able to travel there to support or protect her
- ii) There was a failure to take relevant evidence into account when assessing the Article 8 claim;
- iii) There was a failure to properly consider the best interests of the Appellant’s children.

8. At a hearing on the 19th November 2015 the Respondent, that day represented by Senior Presenting Officer Mr A. McVeety, realistically conceded that there was nothing in the report of Dr Hoehne which could properly have led the Tribunal to conclude the “expert evidence shows that Mogadishu is probably a safe place”. That finding was in fact entirely contrary to Dr Hoehne’s evidence. I agreed. In a written decision dated 27th November 2015 I found the decision of the First-tier Tribunal to contain a material error of law in the approach taken to the expert report. I also noted that the determination makes no reference at all to the relatively recent country guidance of MOJ and Ors (Return to Mogadishu) Somalia CG [2014] UKUT 00442 (IAC) which might be thought pertinent in any assessment of whether it would be safe to return a lone female with two young children to Somalia (see (ix) of headnote in particular).

9. I was further satisfied that the determination has not dealt adequately with the matter of whether it would be in the best interests of the Appellant’s children to ‘return’ to Mogadishu. The failing in this respect in effect overlaps with the error identified above, in that the Tribunal has not conducted, as required by MOJ, a “careful assessment of all of the circumstances”. There are however two other

discrete errors. First, the Tribunal appears to have overlooked or failed to give adequate weight to the evidence of the second child's British father as to his intentions towards his son. Second, there has been no consideration at all of the implications of the Secretary of State 's concession in Sanade and Ors (British children – Zambrano-Derici) [2012] UKUT 00048 (IAC).

10. For these reasons the decision was set aside in its entirety. Since no interpreter was available at that first hearing the matter was adjourned to be listed before me at a later date when the decision could be remade.

The Re-Making

11. At a hearing on the 23rd February 2016 I heard oral evidence from the Appellant and her partner Mr Y. I heard submissions was referred to the written material. I have had regard to all the evidence that I was referred to, including that which is not specifically mentioned herein. At the close of the hearing I indicated that I would allow the appeal and I now explain my reasons why.

Asylum and Article 3 ECHR

12. It has now been accepted that the Appellant is Somali. Although there was some suggestion in the language analysis prepared by 'Verified AB' that she could be Ethiopian or Djiboutian the parties have both accepted the final conclusion of the analyst that the Appellant uses a Northern Somali dialect consistent with her being a "native speaker", ie native to Somalia as opposed to any of its neighbours².
13. Having had regard to the Appellant's evidence, the language analysis provided by 'Verified AB' and the expert report of Dr Hoehne I am not satisfied that it is reasonably likely that the Appellant is from the Kismayo area as she claims. In her interviews she displayed a lack of knowledge of Kismayo and the surrounding region and "astonished"³ Dr Hoehne with her inability to identify the key players in the province in recent years. He too commented on her lack of southern Somali dialect/accent. Her knowledge of her claimed clan was, Dr Hoehne found, "distorted and confused"⁴. He found it to be improbable that she is of the Sheekhal clan and this is a conclusion I adopt, in the absence of any credible evidence to the contrary.

14. I find it to be reasonably likely that the Appellant is a national of

² D11 Respondent's bundle at 4.4

³ Report dated 30th January 2015 at para 38

⁴ *ibid* at 45

Somalia who is from the north of that country. That finding has two consequences for the purpose of my decision. First I reject her claim as it was originally put. In the absence of any alternative narrative advanced by the Appellant that means that my risk assessment must be made on a narrow set of facts. Second, I take notice of the fact that she has advanced an asylum claim on the basis of untruths and that this must have an adverse affect on her general credibility as a witness.

15. The parties agreed that the Appellant, if and when removed from the UK, would be returned to Mogadishu. In considering whether that city, and any onward travel would be safe for the Appellant, I must have regard to two matters: the particular guidance given about the city by the Upper Tribunal in MOJ, and the Appellant's particular circumstances.
16. The narrow set of facts that I can be satisfied about are as follows. The Appellant is from northern Somalia. She arrived in the UK alone. She claimed that her husband had gone missing prior to her flight from Somalia but given that this claim was inextricably linked to her 'Al-Shabaab' narrative little weight can be given to that evidence. What can be said with certainty, since it is not in dispute, is that she was pregnant on arrival. What can also be said with certainty is that since her arrival she has fallen pregnant twice more. Mr Y, the father of the children conceived in the UK, came from Somalia under the Refugee family reunion scheme and is now a British citizen. He claims that he met with the Appellant in the UK and there is no evidential basis for rejecting that claim. I find that he is the father of the Appellant's youngest child and the one on the way but not the eldest. In respect of that child it is evident that the Appellant had sexual intercourse with someone else prior to her arrival. I have considered the possibility that this was non-consensual or a relationship outside of marriage, but given that both of these possibilities would have provided the Appellant with a credible claim for asylum (that would have obviated the need for her to try and learn the lineage of the Sheekhal clan) I consider it unlikely: had either of these things happened it is likely that she would have disclosed this. It is therefore not, I think, impermissible speculation to find that the most likely explanation for her pregnancy on arrival was that she was in a marital relationship within the social norms of Somali culture. Although Mr Harrison was obliged to remind me of the Appellant's poor credibility he agreed that on the facts, this was the most likely explanation.
17. Both parties proceeded on the basis that the children would be returned with their mother and that Mr Y would not follow. He denied that he would leave the UK and I accept it to be unlikely that he would do so.
18. These findings about the Appellant's background lead me to

embark upon risk assessment with the following in mind:

- She is a woman with young children under her care
- She has no known connections to Mogadishu
- Her child to Mr Y has been born outside of wedlock and she is pregnant with a second child in the same circumstances
- She may have family members in the north of the country but her ability to contact them or ask for support is compromised by the fact that she now has a child(ren) outside of wedlock
- Her clan affiliation is unknown but she is not Sheekhal

19. The extant country guidance is MOJ. Following an extensive review of the country background and expert evidence available at the time (the appeal hearing concluding in September 2014) the Tribunal held that there was no general risk of serious harm to civilians returning to Mogadishu. There had been a durable change in that Al-Shabaab had been driven from the city and stood no realistic prospect of regaining territory there (I note that in his evidence to the MOJ Tribunal Dr Hoehne had expressed caution about this conclusion: in his evidence in this appeal he expressly accepts that the country guidance was correctly formulated on this point). The driving out of Al-Shabaab led to a reduction in the number of civilian casualties. In respect of the position of returnees the headnote states:

- (vii) *A person returning to Mogadishu after a period of absence will look to his nuclear family, if he has one living in the city, for assistance in re-establishing himself and securing a livelihood. Although a returnee may also seek assistance from his clan members who are not close relatives, such help is only likely to be forthcoming for majority clan members, as minority clans may have little to offer.*
- (viii) *The significance of clan membership in Mogadishu has changed. Clans now provide, potentially, social support mechanisms and assist with access to livelihoods, performing less of a protection function than previously. There are no clan militias in Mogadishu, no clan violence, and no clan based discriminatory treatment, even for minority clan members.*
- (ix) *If it is accepted that a person facing a return to Mogadishu after a period of absence has no nuclear family or close relatives in the city to assist him in re-establishing himself on return, there will need to be a careful assessment of all of the circumstances. These considerations will include, but are not limited to:*

- *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.*

- (x) *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.*
- (xi) *It will, therefore, only be those with no clan or family support who will not be in receipt of remittances from abroad and who have no real prospect of securing access to a livelihood on return who will face the prospect of living in circumstances falling below that which is acceptable in humanitarian protection terms.*
- (xii) *The evidence indicates clearly that it is not simply those who originate from Mogadishu that may now generally return to live in the city without being subjected to an Article 15(c) risk or facing a real risk of destitution. On the other hand, relocation in Mogadishu for a person of a minority clan with no former links to the city, no access to funds and no other form of clan, family or social support is unlikely to be realistic as, in the absence of means to establish a home and some form of ongoing financial support there will be a real risk of having no alternative but to live in makeshift accommodation within an IDP camp where there is a real possibility of having to live in conditions that will fall below acceptable humanitarian standards.*

20. At paragraph 406 the Tribunal expressly endorsed the view of the UNHCR with respect to arrival of returnees in Mogadishu:

*“With regard to **Mogadishu**, the personal circumstances of an individual need to be carefully assessed. UNHCR*

considers an IFA/IRA as reasonable only where the individual can expect to benefit from meaningful nuclear and/or extended family support and clan protection mechanisms in the area of prospective relocation. When assessing the reasonableness of an IFA/IRA in Mogadishu in an individual case, it should be kept in mind that the traditional extended family and community structures of Somali society no longer constitute as strong a protection and coping mechanism in Mogadishu as they did in the past. Additionally, whether the members of the traditional networks are able to genuinely offer support to the applicant in practice also needs to be evaluated, especially given the fragile and complex situation in Mogadishu at present.

For the following categories of Somalis, UNHCR would consider that an IFA/IRA will not be reasonably available in the absence of meaningful nuclear and/or extended family support and functioning clan protection: unaccompanied children or adolescents at risk of forced recruitment and other grave violations; young males at risk of being considered Al Shabaab sympathizers and therefore facing harassment from government security forces; elderly people; people with physical or mental disabilities; **single women and female single heads of households with no male protection** and especially originating from minority clans. In any other exceptional cases, in which the application of an IFA/IRA in Mogadishu is considered even in the absence of meaningful family or clan support to the individual, the person would need to have access to infrastructure and livelihood opportunities and to other meaningful protection and support mechanisms, taking into account the state institutions' limited ability to provide security and meaningful protection." (my emphasis)

21. For the Appellant Mr Hussain relied on this country guidance. For the Respondent Mr Harrison did not seek to persuade me that the country guidance should not be applied. He pointed to the 'hole' in our understanding about where the Appellant actually comes from and asked me to consider whether there was the evidence to support a finding that the Appellant was *without* help in Mogadishu.
22. I have considered the facts as found against the country background material and the helpful guidance given in MOJ. The Appellant has no known links to Mogadishu. It can be assumed that she has some family somewhere, likely in the North, but I am not satisfied that she can call upon her former husband or family for assistance because she will have the presence of two additional children to explain. In the context of Somali society she is likely to incur considerable hostility because she has had these children

outside of wedlock. This will no doubt be exacerbated if it was her husband or natal family who paid for her departure from Somalia. It is therefore unlikely that she will make contact with her family, or seek to return to the North. She will therefore be a lone woman without male protection in Mogadishu. I find it to be unlikely that she would be able to work to support herself, since she has the young children to care for. Without a support network it is very difficult to see how she would manage employment without childcare. I am satisfied, having heard the evidence of Mr Y, that he is committed to her and that he would seek to support her upon her return to Somalia. He told me that he supports her financially today and I have no reason to believe that he would not continue to do so should she and the children be removed. She would therefore have the safety net of some remittances. Having considered all of these factors I am not satisfied that the Appellant and her children would be safe in Mogadishu, or that it would be reasonable for her to live in the city. Although she may be able to avoid the more squalid IDP camps by virtue of Mr Y's remittances, I find the terms of the UNHCR guidance to be striking: she is a female head of a household *without male protection*. The evidence to the Tribunal in MOJ was replete with references to sexual violence against women, in particular IDPs: see for instance the accepted evidence of Amnesty International, the UN, Dr Hoehne and Mr Mullen. There is nothing in the more up to date evidence provided by Dr Hoehne in this appeal to indicate that the situation has improved [see paragraphs 21-25]. The presence of the children would render her even more vulnerable. I am satisfied that return to Mogadishu is not safe or viable for this Appellant. Accordingly she has made out her claim under the Refugee Convention.

Human Rights: Article 8 ECHR

23. It is not in dispute that the Appellant has two children with her in the UK. At the date of the hearing before me they were respectively approaching their second and first birthdays. Nor is it in dispute that the youngest child is a British national, by virtue of the fact that his father Mr Y was a British citizen when he was born. At the hearing I was informed that the couple are expecting a second child: I was shown medical evidence confirming that the Appellant's estimated date of delivery is the 23rd March 2016. Mr Harrison agreed that if Y is the father of this child (this assertion being unchallenged by the Respondent) this child too will be a British citizen. Although I cannot take the best interests of this unborn child into account I am entitled to consider whether it is reasonably foreseeable that it will be born, and consider the hypothetical situation in which it would be returned, as an infant, to Somalia with his mother.

24. The parties agree that the Appellant cannot succeed in her Article

8 claim with reference to the Immigration Rules. She and Mr Y are not married, nor can they be considered partners, since they have not been cohabiting for at least 2 years. I must consider Article 8 outside of the Rules.

25. I am satisfied that there is a family life between the Appellant and her children. I am satisfied that there is a family life between Mr Y and his baby. I am satisfied that there is a family life shared by Mr Y and the Appellant. They are not presently living together but it is apparent from their evidence that this is because of a set of complicating factors rather than by choice. First of all the couple are cousins, and their relationship has placed a great strain on other relationships within the family. Mr Y's mother took the Appellant in after her arrival in the UK and was then extremely unhappy to discover that her niece had been sleeping with her son. The Appellant was asked to leave the family home as a result. She is now accommodated by NASS and there is a specific prohibition in her tenancy agreement preventing anyone else from staying the night in the property. In any event Mr Y works at night as a security guard. Mr Y told me that despite these challenges he and the Appellant are committed to one another and that when the Creator permits it, they will be married. He said that he visits the Appellant and the children regularly and that he is providing her with financial support. They are looking forward to the birth of the new baby and he will do all that he can to support her. I am satisfied that this is a relationship of substance and that notwithstanding the Appellant's failure to meet the criteria in GEN.1.2 of Appendix FM, this is a family life within the rubric of Article 8. I am by extension satisfied that Mr Y now shares a family life with the eldest child of the family. He told me, and there is no evidence to the contrary, that they are a family.
26. I am satisfied that the removal of the Appellant and the children would result in an interference with their family life with Mr Y. It is his evidence that he would not return to Somalia, a country he has not been to since he was a teenager. I consider it extremely unlikely that he would leave the UK. He is a British national, with family, a home and employment here. I therefore find Article 8 to be engaged.
27. The decision to refuse leave to remain to persons who do not meet the requirements of the Immigration Rules is one lawfully open to the Respondent and it is taken in pursuit of the legitimate Article 8(2) aim of protecting the economy.
28. In assessing proportionality I must have regard to the factors set out in section 117B of the Nationality, Immigration and Asylum Act 2002. All of the factors set out in 117B (1)-(5) must weigh against the Appellant, or put another way, must be considered to diminish the weight to be placed in her side of the scales. She entered the United Kingdom illegally and has not had any leave to remain since her

arrival. She does not, as far as I am aware, speak English to any degree of competency. She is not financially self sufficient; she is presently assisted by NASS and relies on Mr Y for help. Their relationship was established when her status was at the very least precarious, if not unlawful. Mr Hussain accepts all of this. He relies however on the terms of paragraph 117B(6) as it has recently been interpreted by the President in Treebhawon and others (section 117B(6)) [2015] UKUT 00674 (IAC). Where the criteria in 117B(6) are met, there is no public interest in the removal of the person concerned:

(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—

(a) the person has a genuine and subsisting parental relationship with a qualifying child, and

(b) it would not be reasonable to expect the child to leave the United Kingdom.

29. A 'qualifying child' is a child who has been in the UK for a continuous period of seven years or more, or is a British citizen. Since the Appellant's youngest child is British he is a qualifying child. She has a genuine parental relationship with him. The question therefore is whether it would be "reasonable" for the Appellant's British child to go to live in Mogadishu with her.

30. 'Reasonable' does not mean proportionate in the sense that it is understood in the Article 8 sense. Whether it is reasonable that the child is expected to leave the UK must be assessed in light of all relevant factors, but it is not a matter where the public interest has an automatically substantial weight. The child in question is an infant and knows little of his surroundings bar the love and affection of his parents, and possibly his interaction with his big brother. He is 'home' when he is with his mother. The fact that he would be travelling with his mother is then a weighty factor. I must also have regard to the fact that he is British and that he is entitled to enjoy the benefits of his nationality: per Hale LJ in ZH (Tanzania) [2011] UKSC 4. That this is so is expressly recognised by the Respondent in her Immigration Directorates Instruction *Family Migration: Appendix FM Section 1.0b Family Life as a Partner or Parent: 10 Year Routes*. Under the heading at 11.2.3 "would it be unreasonable to expect a British child to leave the UK?" the answer is given:

"Save in cases involving criminality, the decision maker must not take a decision in relation to the parent or primary carer of a British Citizen child where the effect of that decision would be to force that British child to leave the EU,

regardless of the age of that child. This reflects the European Court of Justice judgment in Zambrano.

Where a decision to refuse the application would require a parent or primary carer to return to a country outside the EU, the case must always be assessed on the basis that it would be unreasonable to expect a British Citizen child to leave the EU with that parent or primary carer”.

31. I find that as a young infant the child cannot be separated from his mother. She would be removed to a country outside of the EU. In those circumstances the decision would contravene this guidance and the principles established in Zambrano: see further Sanade and Ors (British children - Zambrano-Derici) [2012] UKUT 00048 (IAC). It would be unreasonable to expect the child to leave the UK. In those circumstances there is no public interest in the removal of the Appellant and her appeal must be allowed with reference to Article 8 ECHR.

Decisions

32. The decision of the First-tier Tribunal contains error of laws and it is set aside.

33. I remake the decision in the appeal as follows:

“The appeal is allowed on asylum grounds.

The Appellant is not entitled to humanitarian protection because she is a refugee.

The appeal is allowed on human rights grounds”.

34. I maintain the direction for anonymity made by the First-tier Tribunal:

“Unless and until a tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify her or any member of her 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”.

Upper Tribunal Judge Bruce
29th February

2016

Fees

There were no fees paid in this asylum appeal and there can therefore be no fee award.

Upper Tribunal Judge Bruce
29th February

2016