



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

Appeal Number: PA/12493/2019

**THE IMMIGRATION ACTS**

**Heard remotely at Field House  
On 30 April 2021 via Skype for  
Business**

**Decision & Reasons Promulgated  
On 7 June 2021**

**Before**

**UPPER TRIBUNAL JUDGE STEPHEN SMITH**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**JG (aka RM)  
(ANONYMITY DIRECTION MADE)**

Respondent

**Representation:**

For the Appellant: Mr E. Tufan, Senior Home Office Presenting Officer

For the Respondent: Ms J. Fisher, Counsel, instructed by Duncan Lewis & Co.  
Solicitors

**DECISION AND REASONS (V)**

*This has been a remote hearing which has been consented to / not objected to by the parties. The form of remote hearing was V (video). A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing.*

*The documents that I was referred to were primarily the decision of the First-tier Tribunal, the Secretary of State's grounds of appeal, and the parties' written submissions, the contents of which I have recorded.*

*The order made is described at the end of these reasons.*

*The parties said this about the process: they were content that the proceedings had been conducted fairly in their remote form.*

1. This is an appeal of the Secretary of State. For convenience, I will refer to the parties as they were before the First-tier Tribunal where appropriate.
2. The Secretary of State appeals against a decision of First-tier Tribunal Judge Hawden-Beal promulgated on 30 November 2020 allowing an appeal by the appellant, a person claiming to be a citizen of Somalia born on 18 February 1975, against a decision of the Secretary of State dated 6 December 2019 to refuse his fresh claim for asylum. The appellant's fresh claim was made on the basis of his claimed membership of the Bajuni people in Somalia, a particular social group.

*Factual background*

3. The appellant entered the United Kingdom in September 1998. It is common ground that he did so in the name of JG, a Tanzanian citizen, bearing what appears to have been a genuine Tanzanian passport issued in that name. The appellant was granted leave to remain on a number of occasions in that identity. In October 2005, he applied for leave as the dependent spouse of a settled person, again in the identity of JG. That application was refused and he did not pursue an appeal against that refusal.
4. In January 2009, the appellant claimed asylum on the basis that he was RM, a Somali citizen of the Bajuni clan. The Bajuni inhabit small islands off the coast of southern Somalia. The appellant claimed that he would face being persecuted on account of being a member of that particular social group. He claimed that the identity of JG had been provided to him by those who facilitated his journey to this country, maintaining that he had claimed asylum in his true, Somalian Bajuni identity. His claim for asylum was refused and the appellant's appeal against the refusal was dismissed before the First-tier Tribunal in October 2010 by First-tier Tribunal Judge Graham.
5. In 2014, the appellant made a fresh human rights claim. It was refused, and the appellant's appeal against that refusal was dismissed by First-tier Tribunal Judge Thorne in June 2014.
6. On 26 August 2014, the appellant made further submissions in support of his asylum claim. He also claimed to have been trafficked to this country. The further submissions were refused in circumstances that did not attract a right of appeal. The National Referral Mechanism rejected his claim to have been trafficked on 26 September 2014.
7. On 9 January 2015, the appellant made further submissions in support of his claim to be a member of the Bajuni clan. The further submissions were refused as a fresh claim on 6 December 2019, and it was that refusal that was under appeal before Judge Hawden-Beal.

8. The appellant enjoys limited leave to remain on the basis of his family and private life. This appeal therefore concerns only his claim for international protection.

*The asylum claim*

9. The appellant's asylum claim commenced with an account of him having been attacked by militia in 1991. The militia killed his father and later his mother. His sister went missing. He fled to Kenya where he started a wholesale clothing business. He was stabbed by his business partner and looked to flee the country. He later met a trafficker who facilitated his travel to this country on the Tanzanian passport provided to him for that purpose. Upon arrival here, the appellant had to surrender his travel documents to the traffickers. They made him work and took his money. The traffickers tracked the appellant down after he claimed asylum. They bundled him into a car and later threw him out of the car onto a motorway.
10. The appellant subsequently provided a medico-legal report detailing 13 lesions and scars which were said to be consistent with the history he provided. Some were consistent with a history of shackling, and that the overall pattern of scarring was highly consistent with a history of torture: see the report by Dr Ioana Steen dated 10 October 2014.
11. When initially refusing the appellant's claim to be a member of the Bajuni claim in 2010, the Secretary of State relied on a *Sprakab* report, a form of linguistic analysis which is sometimes used to assist the determination of claims of disputed nationality and similar matters. See the description at paragraph 3 and following of *Secretary of State for the Home Department v MN and KY* [2014] UKSC 30. The linguists who drafted the report had listened to a recording of an interview conducted with the appellant, and concluded that the dialect of Swahili spoken by the appellant was found in Tanzania, and not Somalia. The appellant had 'deficient' knowledge of Somalia, yet spoke Swahili with the fluent intonation and pronunciation typical of a variety of Swahili spoken in Tanzania. He was not Somalian.
12. The appellant did not attend the hearing before Judge Graham in 2010. It is clear from that decision that the judge scribed significance to the *Sprakab* report – see paragraph 30 – although noted at paragraph 32 that the appellant had not been provided with an audio copy of the recording, which he should have been. The judge also analysed the contents of the appellant's asylum interview and witness statements, finding the account provided by the appellant to lack credibility. The appellant's 2014 fresh claim was based on his human rights claim, rather than a renewed protection claim.
13. In support of his fresh claim in 2015, the appellant relied on a report dated 11 May 2015 by Dr M. Faulkner, a country expert based at the School of Oriental and African Studies. Dr Faulkner interviewed the appellant and considered the *Sprakab* report, concluding that it featured a number of weaknesses (see paragraph 20 and following). At paragraph 16 of the current refusal decision, the Secretary of State accepted that Dr

Faulkner was an expert in his field, but noted at paragraph 18 that he did not appear to have considered the ‘the appeal determination of 13<sup>th</sup> October 2012’ [sic]. That must have been a reference to Judge Graham’s decision, promulgated on 27 October 2010, following a hearing on 13 October 2010. There has not been a decision dated 13 October 2012 in these proceedings. Because Dr Faulkner had not considered Judge Graham’s decision, his report attracted less weight, considered the Secretary of State. The report did not resolve Judge Graham’s concerns about the appellant’s lack of knowledge of Somalia, and nor did it resolve the broader credibility issues raised by the judge in that decision. The fresh claim was refused.

14. In the appeal below, the appellant relied on an addendum report from Dr Faulkner dated 10 March 2020, in which Dr Faulkner sought to address the concerns raised by the Secretary of State in her decision. He addressed the fact that Judge Graham did not have the benefit of hearing evidence from the appellant, while noting that much of the judgment was ‘taken up with matters that are outside of my limited area of expertise’ (paragraph 8). The appellant had been homeless at the time of the appeal and did not receive the notice of the hearing. Dr Faulkner scrutinised the Sprakab report, and addressed a number of other concerns. Part of the appellant’s 2015 fresh claim had relied upon a Somali birth certificate dated 20 November 1980. The Secretary of State had rejected the reliability of the document, as no details had been provided as to its provenance. Dr Faulkner said he was unable to authenticate the document, but observed that he found it odd that a poor fisherman would have travelled to Mogadishu, the location of the issuing authority, to obtain the document.

#### *The decision of the First-tier Tribunal*

15. At paragraph 10, Judge Hawden-Beal said:

“At the start of the hearing it was agreed by the parties that if I found the appellant to be of Bajuni ethnicity, it follows that he will be at risk of persecution as per paragraph 36 of *MOJ & Ors (Return to Mogadishu) Somalia CG* [2014] UKUT 00442 (IAC).”

16. The judge took as her starting point the findings made by Judge Graham in 2010. She noted that the appellant had been homeless at the time of that appeal, and so would not have received the notice of the hearing. She heard the appellant give evidence and was satisfied that the appellant had not been trafficked [39]. The judge compared the different accounts provided by the appellant to the respondent, Judge Graham, and herself [43], and rejected much of what the appellant had said about his history [44]. At [45] she said that, although she had rejected aspects of his credibility, ‘that will not make a jot of difference if I find him to be a member of the minority Bajuni clan from Somalia.’ She analysed the Sprakab report, Judge Graham’s findings, and the two Faulkner reports. Having outlined the contents and analysis of the Faulkner reports, she highlighted his observations that it was unusual for a poor fisherman to have had his birth registered in Mogadishu [53]. The judge noted that the

only reason the Secretary of State placed less weight on the Faulkner report was because it had been drafted without the benefit of Judge Graham's decision. The judge now had Dr Faulkner's addendum report which considered that judgment. At [57] she explained why she preferred the Faulkner reports to the Sprakab report, noting at [58] that the Faulkner reports post-dated Judge Graham's judgment. The judge reached her operative conclusions at [59]; the appellant's account of events prior to 1998 had by 'by and large' been consistent. The appellant had been claiming to be of Bajuni ethnicity since 2009. Dr Faulkner was acknowledged by the Secretary of State to be an expert [60]; he had engaged with Judge Graham's findings. The judge accepted the appellant to be of the Bajuni ethnicity and allowed the appeal, the presenting officer having conceded that that was all that was necessary for the appeal to be allowed: see [10] of her decision, quoted at paragraph 15, above.

### *Grounds of appeal*

17. The Secretary of State appeals on two grounds.
18. First, that she failed to give adequate reasons on a material matter. The grounds contend that the judge failed to deal with the fact the appellant's Tanzanian passport had previously been accepted by the Tanzanian authorities as evidence of his identity. It was an error to prefer the reports of Dr Faulkner over the Sprakab report, and the judge failed to give adequate reasons for preferring one over the other.
19. Secondly, the judge failed to resolve a material conflict of fact, namely the irregularity of the appellant's birth having been registered in Mogadishu.
20. Permission to appeal was granted by Upper Tribunal Judge Martin sitting as a judge of the First-tier Tribunal.

### *Discussion*

21. The appellant provided a rule 24 response to the Secretary of State's grounds of appeal, dated 9 February 2021. Mr Tufan provided a skeleton argument on behalf of the Secretary of State, also dated 9 February 2021. The appellant responded to the Secretary of State's skeleton argument in a further skeleton argument, which was undated but was received on 29 April 2021.
22. The Secretary of State's grounds of appeal seek to challenge the judge's findings of fact. It is necessary to recall that an appeal to the Upper Tribunal lies only on an error of law, not a disagreement of fact.
23. Certain findings of fact are capable of being infected by an error of law, as notably summarised in *R (Iran) v Secretary of State for the Home Department* [2005] EWCA Civ 982 at [9]. There are many judgments of the higher courts which underline the distinction between errors of fact and law, and the need for appellate restraint when addressing findings of fact reached by a judge below. I can do no better than rely on the oft-

quoted judgment of Lewison LJ in *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5 at [114]:

'114. Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them. The best known of these cases are: *Biogen Inc v Medeva Plc* [1997] RPC 1; *Piglowska v Piglowski* [1999] 1 WLR 1360; *Datec Electronics Holdings Ltd v United Parcels Service Ltd* [2007] UKHL 23; [2007] 1 WLR 1325 ; *Re B (A Child) (Care Proceedings)* [2013] UKSC 33; [2013] 1 WLR 1911 and most recently and comprehensively *McGraddie v McGraddie* [2013] UKSC 58; [2013] 1 WLR 2477. These are all decisions either of the House of Lords or of the Supreme Court. The reasons for this approach are many. They include

- i. The expertise of a trial judge is in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed.
- ii. The trial is not a dress rehearsal. It is the first and last night of the show.
- iii. Duplication of the trial judge's role on appeal is a disproportionate use of the limited resources of an appellate court, and will seldom lead to a different outcome in an individual case.
- iv. In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping.
- v. The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence).
- vi. Thus even if it were possible to duplicate the role of the trial judge, it cannot in practice be done.

115. It is also important to have in mind the role of a judgment given after trial. The primary function of a first instance judge is to find facts ` identify the crucial legal points and to advance reasons for deciding them in a particular way. He should give his reasons in sufficient detail to show the parties and, if need be, the Court of Appeal the principles on which he has acted and the reasons that have led him to his decision. They need not be elaborate. There is no duty on a judge, in giving his reasons, to deal with every argument presented by counsel in support of his case. His function is to reach conclusions and give reasons to support his view, not to spell out every matter as if summing up to a jury. Nor need he deal at any length with matters that are not disputed. It is sufficient if what he says shows the basis on which he has acted. These are not controversial observations: see *Customs and Excise Commissioners v A* [2002] EWCA Civ 1039; [2003] 2 WLR 210; *Bekoe v Broomes* [2005] UKPC 39; *Argos Ltd v Office of Fair Trading* [2006] EWCA Civ 1318; [2006] UKCLR 1135.'

24. The judgment in *Fage UK Ltd v Chobani UK Ltd* is seven years old, but it continues to represent a useful summary of the law on the approach to

findings of fact, and the deference owed by appellate tribunals and courts to first instance judges. See the Supreme Court in *Perry v Raleys Solicitors* [2019] UKSC 5 at [52] which summarised the principles on the 'constraints' on appellate courts and tribunals in these terms. Lady Hale said the principles:

'They may be summarised as requiring a conclusion either that there was no evidence to support a challenged finding of fact, or that the trial judge's finding was one that no reasonable judge could have reached.

25. More recently see the Court of Appeal in *Lowe v Secretary of State for the Home Department* [2021] EWCA Civ 62 at [29] and *KM v Secretary of State for the Home Department* [2021] EWCA Civ 693 at [77].
26. Against that background, I turn to the grounds of appeal. Mr Tufan highlights what he contends are a series of weaknesses in the reports of Dr Faulkner. In his 2015 report, Dr Faulkner acknowledges that he is not a trained linguist. He does not speak Bajuni, yet proceeds to analyse the appellant's proficiency in the language. The expert does not deal adequately with the appellant's lack of knowledge of matters relating to the currency of Somalia, nor its spelling, nor other basic facts which he 'brushes off'. The judge erroneously accepted the evidence of Dr Faulkner at face value, rejecting the Sprakab report without sufficient analysis.
27. I reject these submissions which amount to disagreements of fact rather than errors of law. The judge's decision was careful and thorough. It is entirely clear from reading the judge's decision the basis upon which she accepted the appellant to be of Bajuni ethnicity. She noted that Dr Faulkner, who had the benefit of interviewing the appellant on a face to face basis, observed that the appellant was able to provide some details concerning life as a Bajuni: [47]. She addressed Dr Faulkner's expertise, and his consideration of whether the appellant was feigning his knowledge of Bajuni culture, having acquired it from elsewhere: [48]. She noted what the appellant had been able to confirm to the expert about Somalia and his claimed culture, at [49], before addressing weaknesses in the Sprakab report. They included the fact that one of the (unnamed) Sprakab analysts claimed to have worked at a Bajuni refugee camp at a time when, in fact, it was closed. Dr Faulkner had spent time living with the Bajuni community at the Kenyan border: [51]. The judge then addressed the basis upon which the respondent had initially rejected the analysis of Dr Faulkner, namely that his first report had been drafted without sight of Judge Graham's decision. Responding to submissions made by the presenting officer before her which had expanded upon the Secretary of State's initial criticism of the report, the judge explained why she did not discount the report's reliability on account of the appellant having not been re-interviewed, or Dr Faulkner having not considered the audio of the original recording. The Secretary of State has not challenged those specific reasons before me.

28. Judge Graham's decision had been reached without the benefit of the appellant giving evidence. By contrast, not only did this judge have the benefit of the two Faulkner reports, she also had the benefit of hearing the appellant give evidence, and be cross-examined before her. Having conducted thorough analysis on that basis, the judge reached her global conclusions on the reliability of the Faulkner reports at [57] and following. Put simply, she preferred the Faulkner reports to the Sprakab reports, when assessed to the lower standard, for the reasons she gave. That is precisely what first instance judges are required to do; resolve conflicting evidence, and reach clear and decisive findings of fact. The judge has done just that in this case.
29. The impact of the Tanzanian passport on the judge's findings was a question of weight. It was not capable of dealing the killer blow to the appellant's case the Secretary of State contends it should have inflicted. That a genuine passport issued in the name of JG was held by this appellant does not inexorably lead to the only conclusion that the appellant was JG. The 'JG' to whom the passport was issued may well have been a real person, and the passport may have been obtained in his name. Or it may have been a genuine document that had been obtained fraudulently. That reality does not conclusively address whether the appellant is JG or bind judge to find that the appellant was JG, when assessing the appeal to the lower standard. The judge gave detailed reasons for accepting Dr Faulkner's opinion that the appellant was of Bajuni ethnicity. The role of the passport was a question of weight. Barring irrationality, questions of weight are for the trial judge. Not all judges would have reached these findings, but in doing so this judge did not fall into error.
30. It is nothing to the point that the judge did not address why the appellant's birth certificate had been issued in Mogadishu, which is some way from the coastal islands he claimed to be from. An appellate court should not assume too readily that a tribunal misdirected itself just because every step in its reasoning is not set out: see *R (Jones) v First Tier Tribunal and Criminal Injuries Compensation Authority* [2013] UKSC 19. Putting to one side the fact that the document itself, purportedly issued in 1980, would have been obtained by the appellant's parents when he was a young child and he therefore would not necessarily know why they had chosen to register his birth in Mogadishu, the judge did acknowledge the weaknesses arising from that aspect of the appellant's account. She noted that Dr Faulkner had observed that it was unusual for a poor fisherman to travel that far to register the birth of his son. That was clearly a factor the judge took into account when reaching her decision, having clearly considered the entirety of the evidence in the case.
31. It is trite law that judges do not need to address every submission in detail. Indeed, judges of the First-tier Tribunal are frequently encouraged to avoid excessive detail. In any event, the operative reasons given by the judge for allowing the appeal related not to the appellant's birth certificate, but to the reasons given by Dr Faulkner in his two reports,



when scrutinised against the competing evidence in the form of the Sprakab report. Had it been the case that the birth certificate assumed a central role in the judge's reasoning, then one may have expected to see further analysis. As things stand, however, this aspect of the Secretary of State's analysis amounts to no more than "island hopping", against the background of the judge's survey of the whole sea of evidence.

32. In any event, while Dr Faulkner does consider it unusual that the appellant's birth certificate was registered so far away, nothing in his qualifications suggests that he has any expertise in the Somali birth registration system in 1980. I have not been taken to any background materials relied upon by the Secretary of State addressing that issue either. While, when assessed against Western standards, travelling so far to register a birth may seem unusual, there were no materials that were before the judge, or that are before this tribunal, demonstrating that no reasonable judge could have reached the findings she reached when 'contaminated' by a birth certificate purportedly issued in Mogadishu. There was simply no evidence to suggest that the practice in Somalia at the time could only have admitted of the conclusion that birth certificates would be registered in the locality.
33. Drawing this analysis together, therefore, the Secretary of State's grounds of appeal amount to no more than a disagreement with the well reasoned and thorough findings of fact reached by the judge. Contrary to the Secretary of State's assertion that insufficient reasons were given to reconcile conflicts in the evidence, it is plain from the reasons given by the judge why she reached the conclusions she did. This is not a decision whether reader is left wondering why or on what basis the judge resolved the case as she did. The grounds of appeal are without merit.
34. Before concluding, I should address a matter raised by Mr Tufan in the skeleton argument submitted on 9 February 2021, but not raised in the grounds of appeal.
35. Mr Tufan's skeleton argument sought to apply to withdraw the concession recorded at [10] of the judge's decision (quoted at paragraph 15, above), by reference to *Carcabuk & Bla v Secretary of State for the Home Department* (00/TH/01426). The fourth guideline concerning the role of an adjudicator upon a presenting officer making a concession provides:
 

“(4) A HOPO [Home Office Presenting Officer] may make any concession before an adjudicator. If he does, the adjudicator may ask him to reconsider it if he believes it may be wrong to make it. But the adjudicator must always bear in mind that the appellant may have prepared his case on the basis of the concession and so must ensure, if he persuades the HOPO that he should not make it, that the appellant is not prejudiced. In reality, HOPOs should not make concessions unless sure that they should be making them.”
36. Mr Tufan submitted that the concession was plainly wrong and should not have been accepted by the judge. Minority clans, including the Bajuni, are

not automatically at risk in Somalia, he submitted. The judge's reliance on paragraph 36 of *MOJ* was misplaced, he submits; that paragraph does not concern Bajuni clans, and, properly understood, *MOJ* held that there was no persecution for minority clan members in Mogadishu. That led to an erroneous approach to the judge's findings concerning risk on return, which, in any event, could not be sustained for the reasons set out in the grounds of appeal.

37. Mr Tufan's attempt to withdraw the concession at the error of law stage amounts to an attempt to expand the grounds of appeal upon which the Secretary of State enjoys permission to appeal. The application fails to engage with the fifth guideline in *Carcabuk* which states:

"If a concession is made by a HOPO, it must be accepted by the adjudicator."

38. The judge's Record of Proceedings clearly records the concession being made, as I explained to the parties at the hearing, and Ms Fisher, who appeared below, confirmed that the said discussion did take place, and that the concession was made.
39. Putting to one side the fact that the Secretary of State does not enjoy permission to appeal on this basis, I do not consider that it would be appropriate to permit the Secretary of State to withdraw the concession at this stage. *Carcabuk* suggests that the judge was bound to accept the concession. It would be prejudicial to the appellant to permit the concession to be withdrawn. In light of the Secretary of State's concession, the appellant focussed his submissions before the First-tier Tribunal on the sole, and what was thought to be determinative, issue of whether he was a member of the Bajuni.
40. By permitting the Secretary of State retrospectively to withdraw the concession, the appellant would be exposed to prejudice in the form of the unresolved question of whether, notwithstanding his membership of the particular social group, the Bajuni in Somalia, he would face being persecuted in Somalia. By virtue of the concession, he had legitimately not addressed that question before the First-tier Tribunal, relying on it to his detriment. The Secretary of State did not raise this point in her grounds of appeal to this tribunal. It was only when making supplementary written submissions in these proceedings that she chose to do so. I decline to permit the Secretary of State to withdraw the concession she made in this case before the First-tier Tribunal. The Secretary of State conceded that membership of the Bajuni was sufficient, and, by accepting that concession, the judge did not fall into an error such that this tribunal will interfere.

### *Conclusion*

41. The decision of the First-tier Tribunal did not involve the making of an error of law such that it must be set aside.
42. I maintain the anonymity order already in force.

**Notice of Decision**

This appeal is dismissed.

The decision of the First-tier Tribunal did not involve the making of an error of law such that it must be set aside.

**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            *Stephen H Smith*

Date 25 May 2021

Upper Tribunal Judge Stephen Smith