



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

Appeal Number: AA/00579/2010

THE IMMIGRATION ACTS

**Heard at Glasgow
On 27 September 2013**

**Date Sent
On 31 January 2014**
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Before

UPPER TRIBUNAL JUDGE DEANS

Between

MR ZAKARIA SAIDI ALI

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr D Byrne, Advocate, instructed by J R Rahman,
Solicitors

For the Respondent: Mr A Mullen, Home Office Presenting Officer

DETERMINATION AND REASONS

- 1) This an appeal remitted by the Inner House of the Court of Session to the Upper Tribunal in terms of an interlocutor dated 13 October 2011 and accompanying Joint Minute. The appeal was previously considered by the Upper Tribunal and dismissed on asylum and human rights grounds in a determination dated 21 February 2011.
- 2) The basis of the appellant's claim is that he is a Bajuni from Somalia. The respondent did not accept this and in the refusal decision relied in part upon a linguistic report prepared by SPRAKAB. At the previous hearing before the

Upper Tribunal it was agreed by the parties that no reliance should be placed on the SPRAKAB report in respect of this appellant.

- 3) The appellant sought to rely on an expert report by Mr Brian Allen. Mr Allen accepted that the appellant is a Bajuni from the island of Chula in Somalia. In its decision of 21 February 2011 the Upper Tribunal found that the appellant is a Bajuni but not that he was from Somalia rather than from Kenya. The application to the Inner House was made on the basis that the Upper Tribunal erred in law in failing to state adequate reasons for not accepting the evidence of Mr Brian Allen in relation to whether the appellant was a member of the Bajuni clan from Somalia. The appeal was remitted to the Upper Tribunal in terms of the interlocutor of 13 October 2011 to consider the evidence of Brian Allen in relation to whether the applicant was a member of the Bajuni clan from Somalia and to provide adequate and comprehensible reasons for the decision reached.
- 4) At the hearing before me it was accepted on behalf of the respondent that if the appellant were found to be a Bajuni from Somalia his appeal would succeed.

Evidence

- 5) The appellant was called as a witness and adopted two witness statements. The first of these was dated 13 April 2010 and was prepared for a hearing before the First-tier Tribunal and the second was a supplementary statement dated 26 September 2013, prepared for the hearing before me. According to the statement of 13 April 2010, the appellant is a Bajuni and was born on Chula Island in Somalia. His father was a fisherman. Both his parents are now deceased. He had one brother and one sister. His sister was killed by the Darood militia. His brother was abducted by the Darood militia and the appellant has not seen him since. The appellant lived a peaceful life with his family until 1992, when he was about 6 years old, when violence started and the majority tribe began to attack the islands. In 1993 Chula was attacked by the Darood, who killed the appellant's neighbours and members of his extended family. The Appellant and his immediate family managed to escape and left together by boat for Mombasa. There were about 9 or 10 people in the boat altogether. When they reached Mombasa they were sent to Jomvu Camp. The appellant stayed there for about 5 years. At the end of 1997 the Kenyan Government announced that Jomvu Camp would be closed. It was believed at that time that it was safe to return to Somalia. The family were given the option of returning to Somalia or going to Kakuma Camp. The family chose to return to Somalia. On return to Chula Island they found that some of the houses had been destroyed and some of the houses were occupied by the Darood. All the boats had been confiscated. The appellant's house had been burnt down. The appellant and his family went into the bush to clear the bush and build another home in which to live. His father had difficulty fishing because he had no boat and he was forced to be a labourer. Although life was difficult and humiliating the family managed to live until April or May 1998

when they were attacked again. The village was invaded and some neighbours were beaten. In July 1998 the Darood broke into the appellant's home. The appellant's sister was raped. The family were beaten. After this the family lived in constant fear. In 2000 the appellant was at the Madrasa early in the morning when the Darood invaded the Madrasa intending to abduct youths to use as child soldiers. The appellant was stabbed in his arm with a knife. Because he was bleeding heavily he was left behind by the Darood and he returned home. In June 2002 the home was attacked again by the Darood. The appellant's father was badly injured. In October 2003 the Darood attacked the family at night. The appellant's father and brother were fishing at sea. The appellant was in the house with his sister and mother. The appellant was beaten. His sister was raped and received a head injury. She died of her injuries. In May 2005 the appellant was at the Madrasa around noon when he heard the sound of shooting. A teacher told the students not to go outside. After an hour they left. When the appellant went home he saw that two neighbours had been killed. He found that all of his house had been broken down and his mother had been murdered. He was told she was killed by the Darood. The appellant's father and brother carried on working as labourers but the family remained in constant fear. In September 2008 in the early morning the appellant was woken by the sound of screaming from his neighbours. The house was then broken into and the appellant's brother was abducted. He was tied up by the Darood and taken away. The appellant was left alone with his father. At the end of 2008 the appellant's father said he was going to work and to look for food. He did not return. That evening a friend of the appellant's father came and told the appellant that his father had been killed and thrown into the sea because he was suspected by the Darood of spying for the Hawiye. The appellant's father's friend, Musa, told the appellant to come and live with him. The appellant did this until Musa decided in February 2009 that they should flee. They left at night by sea in a boat with 8 people. Musa had stolen the boat. They sailed to Yemen, which took about 6 days. They were afraid of being attacked by pirates or by Darood militia but they were prepared to take that risk because of the conditions they had faced on land. When they reached Yemen the appellant stayed on the boat until he was told by Musa that the boat had been sold and Musa took him into town. He handed the appellant over to another person, called Salum. The appellant stayed in Salum's house for 3 days until he was taken to the airport and left Yemen by plane. They changed planes and then took a train, on which the appellant arrived in Liverpool. The appellant claimed asylum.

- 6) In the appellant's supplementary statement of 26 September 2013, he records that he has a partner, Maryam Ali. They have a child called Zuheir Ali, born on 13 June 2011, and Maryam is now expecting another child due in October 2013. Maryam is a British citizen of Somali Bajuni origin. The couple met at a wedding in Glasgow near the end of 2009 and started a relationship. As Maryam lives in London, where she works as a nurse, she will visit the appellant in Glasgow or he visits her in London. The appellant was reluctant to tell anyone about the relationship because he had been told by members of the Bajuni community that if he did not have a right to

stay in the UK he would not be allowed to marry or to have a baby. It was not acceptable in the Bajuni community to have a relationship and start a family outwith marriage.

- 7) At the hearing before me the appellant was cross-examined by Mr Mullen. He confirmed that he was a Somali Bajuni from Chula. He said he came here from there in July 2009. The appellant was asked if he had lived in any other country apart from Great Britain and the appellant replied that he had not. He was then asked if he had lived in refugee camps in Kenya and he confirmed that he had. He was asked why he had said no to the previous question. The appellant replied that this was not a country where he had lived. He was inside a refugee camp and did not live inside the country. He was in a refugee camp for 5 years. He confirmed that this was Jomvu Camp. He was asked if he could come and go from the camp to the other parts of Kenya and he said that he could not. He left at the end of 1997.
- 8) The appellant confirmed that apart from the time he had spent in Jomvu he had spent all his life on Chula. He was asked how long Chula was in kilometres. The appellant said he did not know as he was not educated. He was asked how long it would take to walk from one end to the other. The appellant said he could not give an answer but it was not that far. It was put to the appellant that he had spent a number of years on Chula and could not say how long it would take to walk from one end of the island to the other. The appellant said he just used to go around his own area and he was very young at the time. The appellant was asked if he had spent any time on mainland Somalia and he said he had not.
- 9) The appellant was asked what made him leave Somalia. He replied that this was after his father was killed at the end of 2008. He was on his own after this and he was a young man. A friend of his father, who was a fisherman, helped him to escape. He went from Chula to Yemen and then from Yemen to another place where there were white people. From there he took a plane. He used someone else's passport to enter Britain. This was given to him by an agent. The agent was arranged by his father's friend Musa. It was Musa who paid for the flight and the passport. Musa sold his boat. The appellant was asked how big this boat was and replied that it was not that big - it was a "machine boat". He was asked if it was a small boat with an outboard engine. The appellant answered that it was and described it as having a machine at the back which was taken off when you were finished and put back on when you got in. He described the boat as being about twice the length of the table he was sitting at in the hearing room. The appellant was asked if the sale of this boat raised enough money to pay for a passport and a flight for the appellant to travel to the UK. The appellant said he saw the money but he did not know how much it was.
- 10) The appellant confirmed that he had met Maryam at the end of 2009 and that they have a son together and another child on the way. Maryam and their son live in London and the appellant lives in Glasgow. The appellant spends two weeks at a time in London and then returns to Glasgow to sign

on in accordance with his reporting conditions. When he is in London he is the main carer for their son.

- 11) The second witness was Maryam Abubakar Ali, who adopted her witness statement dated 26 September 2013. In her statement she records that she was born in Kismayo in Somalia and is of Bajuni origin. She came to the UK at the end of 2000 or the beginning of 2001, when she was 12 years old. She was given asylum and became a British citizen in 2004. She and the appellant have a child, Zuheir Ali, born on 13 June 2011 and at the time of the hearing she was expecting another child in October 2013. She works as a nurse in London and was on maternity leave at the time of the hearing. She confirmed having met the appellant at a wedding in Glasgow. Once Zuheir was born she would pay for the appellant to travel to London to help her and see his son. She lives with her brother and she was very worried that he would be angry when he found out she was pregnant. It was not part of Bajuni culture to have a relationship without marriage. She explained to her brother that she loved the appellant but due to his circumstances and the position he was in they could not marry. She wanted to have the baby. Her brother was very angry but he calmed down. She described her relationship with the appellant as one like marriage. She knew they were being talked about in the Bajuni community.
- 12) At the hearing the appellant confirmed that the appellant is her partner. She knows that he is from Chula in Somalia because they speak the same language and do the same things, even though she is from Kismayo. She had family and friends from Chula. Her father and brother were fishermen. She had never been to Chula but she had introduced the appellant to friends from Chula. They got along very quickly and easily and talked about difficulties in the island and other things.
- 13) In cross-examination Maryam Ali was asked about the appellant's visits to London. She said that she and the appellant are together until her brother comes home from work and then the appellant goes to stay with a friend. The appellant stays to look after their son when Maryam Ali is on night shift. Her brother knows about the relationship but does not like them staying together in the house because it is against their religion. Maryam Ali confirmed that she is expecting a second child. She was asked what prevents her and the appellant from marrying. She replied that they had thought about it but the appellant was scared. He had been told that he was not allowed to marry if he did not have leave to remain and did not know what was happening to his case. They wanted to marry in accordance with their religion.
- 14) Maryam Ali was asked who looks after her son when she was working. She said that a friend cares for him until 6.30 and then he goes to her sister-in-law until she picks him up at 9.30. The appellant was able to look after him when he was in London.

15) In re-examination Maryam Ali said the appellant is able to stay two weeks and then returns to Glasgow to sign on. If he left the UK it would be very difficult for her, particularly as she was expecting her second baby. The children needed a father. She herself no longer had any family in Somalia. The question was raised as to whether Maryam Ali could return to Somalia as a Bajuni. Mr Mullen acknowledged that as the child was a British citizen and a citizen of the European Union, he could not be expected to leave the UK to go to Somalia.

Submissions

16) In his submission for the respondent Mr Mullen replied on the reasons for refusal letter. He pointed out that this was the appellant's third appeal hearing and at the two previous hearings judges had found that his evidence was not credible. The adverse credibility finding was not based on a SPRAKAB report but on the appellant's lack of knowledge of his home island. According to Mr Allen's report it would take 20 minutes to walk between the two main villages on Chula, which was a small island. According to paragraph 19 of the reasons for refusal letter there were two roads on Chula but at his asylum interview (Q172) the appellant said there were no roads on the island. At the hearing today the appellant could not say how long it would take to walk from end to end of the island. The island was three miles long by one mile wide and if someone had lived most of their life there it was reasonable for them to know the distance from one end to the other.

17) Mr Mullen continued that in cross-examination the appellant had been asked if he had been to any other country and he said no. When clarification was sought about whether he had been to Kenya he said yes but he was in a refugee camp. This was not a good answer. In his first witness statement he gave a detailed account of leaving Chula and he was unlikely to have forgotten this. It was clear from his witness statement he knew he was going to Kenya when he left Chula. The appellant's evidence was characterised by not knowing, and being unable to remember, matters which the appellant ought reasonably be expected to remember. This was not a case where the appellant claimed to have left the Bajuni islands as a young child and was unlikely to have any memory of his time there.

18) Mr Mullen referred to the report by Mr Brian Allen. There was nothing in the report he would suggest was wrong but, for example, the description of the roofs of the Bajuni houses was not exclusive to the Bajuni islands. There was nothing to say that Bajuni villages in Kenya were not similar to those in the Bajuni islands. The appellant described a Bajuni dance and Bajuni activities but these were not necessarily exclusive to the Somali Bajuni and were not determinative of the appellant being Bajuni.

19) Mr Mullen referred to the appellant's account of his journey to the UK. It was said that a friend of his father provided money by selling his boat. It

was unlikely that the boat would have raised sufficient money. The appellant's account was fabricated.

- 20) It was suggested to Mr Mullen that the appellant may have been born in Chula but left in 1993, as he described leaving for the first time, and never returned.
- 21) Mr Mullen responded that if the appellant had refugee status in Kenya he had concealed this. He could have the nationality of a third country. This was entering the realms of speculation. There was no evidence to show that the appellant was born in Chula and left there, as opposed to never having been there.
- 22) Turning to Article 8, Mr Mullen relied upon the decision of the Inner House in MS (India) [2013] CSIH 52, in terms of which the appellant would need a good arguable case to succeed under the Immigration Rules. The appellant has a British child and a British partner but the appellant divides his time between Glasgow and London. His removal would not breach Article 8. He did not spend much time with the child, who was looked after by a friend and by the appellant's partner's sister-in-law when she was working. Mr Mullen stated that he was not suggesting the appellant's child would follow him if he was removed. There were no reasons why the couple should not live together but they did not do so. The appellant was supported by his partner.
- 23) For the appellant Mr Winter submitted the appeal should be allowed under the Refugee Convention and under Article 8. The appellant should be found credible. The previous decision of the Upper Tribunal was set aside because of a failure to take account of the report by Brian Allen. Mr Allen accepted the appellant spoke Kibajuni and was an ethnic Bajuni. Mr Winter referred to the events described by the appellant on Chula Island and to the money he required to travel to the UK. The appellant's evidence was that he saw this money but did not know how much it was. The appellant had no real knowledge of what was paid. Mr Winter referred in detail to the report by Mr Allen. Even if the appellant's evidence was not accepted as a whole then it was still the case that the appellant was a Bajuni from Somalia and he had not returned to Somalia from Jomvu Camp. His claim might be essentially true even if it was embellished.
- 24) In relation to Article 8 Mr Winter referred to the best interests of the appellant's British child. There were administrative obstacles to the couple being together. Finally Mr Winter submitted in accordance with AMM [2011] UKUT 00445 that even if the appellant was not a Bajuni, he could not return to Somalia.

Discussion

- 25) In his submission before me Mr Mullen challenged the credibility of the appellant's evidence and relied, in particular, on the reasons for refusal

letter, which is dated 23 December 2009. This letter refers to the appellant's lack of knowledge of the island of Chula and also alleges a lack of knowledge of the Bajuni in Somalia. It is said that the appellant gave inconsistent dates about the death of his father and the occasion when he claims to have been stabbed. His account of returning from Jomvu to Chula relying on arrangements made by his family and transport provided by a mosque was inconsistent with the country information, which stated that the repatriation of Bajuni was funded and organised by UNHCR. In his favour, however, the appellant has the report of Mr Brian Allen, the evidence of his partner, Maryam Ali, and a medical report. The medical report is described in the refusal letter as inconclusive because it cannot say with certainty how the appellant's injuries were caused.

- 26) Maryam Ali had not been asked to give evidence at any previous hearing. She gave her evidence before me in a very straightforward and seemingly frank manner. Not only did she describe her relationship with the appellant in this country, but she accepted his account of his Bajuni origins and said that she had friends from Chula who appeared to have done so also. I accept, of course, that Maryam Ali is not an impartial witness but her evidence ought not to be disregarded on this account alone. In particular, I see no reason not to accept as credible her account of her relationship with the appellant.
- 27) I turn next to the evidence of Mr Brian Allen. Mr Allen interviewed the appellant in "the Swahili language (Kibajuni dialect)" without an interpreter. Mr Allen had seen the appellant's asylum interview record, the refusal letter, the medical report and a statement by Mr Ali Hassan Ali, who gave evidence for the appellant at a previous hearing. Mr Allen asked the appellant about Chula and the other Bajuni islands. He asked about the Bajuni clans including their work, money, and food. The appellant gave an account of the tsunami of 2004 and of Jomvu Camp. The appellant described traditional dances, festivals and clothing. He described marriage customs and funeral customs, circumcision and charms. He referred to having attended the Madrasa and described other Bajuni customs and the origin of the Bajuni.
- 28) Mr Allen points out that the Bajuni vary greatly in their knowledge of Kibajuni, which is dying out as a dialect. The younger generation prefer coastal Swahili, which is used in many Bajuni homes. In the appellant's home the language spoken was Kibajuni but when he was in Mombasa he learned more Swahili. When Mr Allen spoke to the appellant at interview in Swahili the appellant responded in Swahili although he used Kibajuni words and spoke with a Somali Bajuni accent. Mr Allen asked the meaning of Kibajuni words taken from a list. He states that the appellant had no way in advance of knowing which words he was to be asked. The appellant immediately recognised 30 out of 31 words and gave their correct Swahili equivalents. He explained the meaning of other Kibajuni words. This test together with the appellant's use of Kibajuni words during the interview and the appellant's Somali Bajuni accent satisfied Mr Allen that the appellant has

been exposed to Kibajuni and has a definite ability in this dialect. Also present at the interview with Mr Allen was a Kibajuni interpreter who has been recognised by the Home Office as coming from the Bajuni islands. He attended the interview as an observer at Mr Allen's request. He confirmed the appellant's fluency in the Kibajuni dialect.

- 29) Mr Allen concludes that the appellant had some accurate knowledge of Chula. He knew about the two villages and the mosque. His description of customs was very much in line with Somali Bajuni customs. He used food names in line with Somali Bajuni tradition rather than Kenyan Bajuni. He described the work of fishermen in accordance with the accounts given by Somali Bajuni fishermen. He described the Bajuni origins and the names given to them. He had some accurate knowledge of the local currency and listed the names of Somali Bajuni clans. He has Bajuni features and speaks with a strong Somali Bajuni accent. He had some accurate knowledge of the Somali islands. He described the tsunami at the end of 2004 in great detail. He was describing things he had seen and experienced and was not just conveying information. He described life at Jomvu Camp in line with many reports that Mr Allen had heard. He has a definite knowledge of Kibajuni and some knowledge of the Somali language. His descriptions of the attacks on the Bajuni people by the Somali majority tribes given in his interview and asylum statement were consistent with accounts of these attacks that Mr Allen has heard. Taking these factors together, Mr Allen regards them as very strong evidence of nationality. He describes himself as "completely convinced" that the appellant is a Bajuni from Chula Island. During the three hour interview he gave no indication of coming from a different country where Swahili is spoken. Mr Allen records that he has lived in Kenya for 11 years and Tanzania for 10 years and was very familiar with the Swahili accents of these countries.
- 30) I regard Mr Allen's report as strong evidence that the appellant is a Somali Bajuni in origin. Mr Mullen submitted that some of the matters referred to by Mr Allen, such as housing and customs, were unique neither to Somalia nor to the Bajuni. It is clear from Mr Allen's report, however, that he relied on cumulative factors as well as individual factors. I do not consider, however, that the appellant would have had to have been in Somalia in 2004 to describe the effect of the tsunami as I see no reason to suppose that this would not have impacted also upon the adjacent coast of Kenya
- 31) Nevertheless, there are some strong arguments in the respondent's case affecting the appellant's credibility, in particular his lack of knowledge of Chula, as well as discrepancies over dates. Of particular significance is the appellant's account of his journey from Yemen to the UK, which he claims was financed by the sale of a small boat with an outward motor. This claim is inherently implausible. I am not satisfied that the appellant has told the truth about how his journey to the UK was organised and financed. Even if his father's friend had sold the boat for a satisfactory sum, would this friend have been prepared to expend so much money on sending the appellant to the UK rather than supporting himself in Yemen? The appellant's evidence

about his journey to the UK being financed from the sale of his father's friend's boat is not credible.

- 32) Nevertheless, if the appellant left Chula in 1993 around the age of 8, rather than in 2009 at the age of 24, this would explain his lack of knowledge about Chula. His knowledge is much more of the sort which would be expected from someone who left at the age of 8 than from someone who left at the age of 24.
- 33) Looking at the evidence as a whole, and in particular the evidence of Mr Allen and of Maryam Ali, whom I find to be a credible witness, I am satisfied that the appellant was born in Chula and is of Bajuni origin but he left there around the age of 6 to go to Jomvu Camp in Kenya. It appears that he spent some years in Jomvu Camp. What happened after that is difficult to ascertain. Mr Mullen suggested that the appellant might have acquired the nationality of another country but this is, as Mr Mullen acknowledged, no more than speculation. Mr Mullen acknowledged that if the appellant was able to establish that he was Bajuni from Somalia then his appeal should succeed. I am satisfied that the appellant has established that he was born a Somali Bajuni. As such his asylum claim should succeed.
- 34) As the appellant has established that he is a Somali Bajuni it is not necessary to consider Article 8 in any detail. Suffice it to say that the appellant is someone who has a partner and a child in the UK and his partner is expecting a second child. The appellant's child is a British citizen. The appellant cannot return to his country of origin and nor can his partner. It is in the best interests of the child to remain in the UK with both parents. These are very compelling reasons why it would be disproportionate to expect the appellant to leave the UK. Mr Mullen acknowledged that the appellant's claim was made before the introduction of the new rules in relation to private and family life in July 2012.

Conclusions

- 35) The previous decision of the Upper Tribunal has been set aside in the Court of Session.
- 36) I re-make the decision in the appeal by allowing it on asylum and human rights grounds.

Anonymity

- 37) The First-tier Tribunal did not make a direction for anonymity and I do not consider an order to this effect to be necessary.

Signed

Date

Judge of the Upper Tribunal