



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/09983/2017

THE IMMIGRATION ACTS

Heard at Field House
On 17 May 2018

Decision & Reasons Promulgated
On 30 May 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE LATTEER

Between

ASO
(ANONYMITY DIRECTION MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms J Bond, counsel.

For the Respondent: Mr E Tufan, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against a decision of the First-tier Tribunal dismissing the appellant's appeal against the respondent's decision of 17 March 2017 refusing him asylum and humanitarian protection.

Background.

2. The appellant is a citizen of Somalia born on 10 December 1994. The background to his application can briefly be described as follows. The appellant left Somalia when he was five and lived in Kenya from 2000 to 2008. He then travelled to Uganda where

he lived until February 2016. Whilst in Uganda he made two applications in August 2008 and June 2010 for visas to enter the UK but both were refused.

3. In February 2016 he travelled to Sudan where he stayed for two days before moving on to Egypt. He then went to Turkey, staying there until 1 April 2016, then going to Greece by boat where he stayed until October 2016. He claims that he arrived in the UK by plane on 6 October 2016. On 27 October 2016 he was served with notice as an illegal entrant and he applied for asylum the same day.
4. The appellant claimed to be at risk of serious harm on return to Somalia on the basis of his race, as a member of a minority clan. The respondent accepted that the appellant was from Somalia but not that he was a member of a minority clan, the Benadiri, as he claimed. The respondent went on to consider the general situation in Somalia and the appellant's claim that Al Shabaab would recruit him. Having considered the country guidance decision in MOJ and Ors (Return to Mogadishu) Somalia CG [2014] UKUT 442, it was the respondent's view that he was from a majority clan and could seek support from them on return.
5. She also considered that the appellant would be able to secure employment on return to Mogadishu. He would not be at risk of recruitment from Al Shabaab as at interview he had said that they had never tried to recruit him. He would be no greater risk from Al Shabaab than the general population in Somalia. The background evidence indicated that Al Shabaab had no influence in Mogadishu and, therefore, there was no risk of recruitment by them. Further, the respondent was not satisfied that the appellant would be at risk of treatment contrary to article 3 or that the refusal of his application would lead to a breach of article 8.

The Hearing before the First-tier Tribunal.

6. At the hearing before the First-tier Tribunal, the judge was handed two decisions relating to the appellant's sister. The first was a decision of Judge Naphthine issued in April 2004. The appellant's sister had applied for asylum, but it had been refused. At the hearing of her appeal the judge found that neither she nor her mother, who had also given evidence, were reliable witnesses and rejected her account that she was from a minority clan.
7. The second decision issued on 22 March 2017 followed a hearing before Judge Carroll. The appellant's sister had remained in the UK after the previous decision and had made a fresh claim for asylum. Judge Carroll found that there was no reason to depart from the previous finding that she was not from a minority clan but the appeal was allowed on humanitarian and human rights grounds on the basis that she would be at risk because of her vulnerabilities including being a lone woman returnee.
8. To complete the picture so far as that appeal is concerned, at the hearing before me a copy of the decision of the Upper Tribunal issued on 5 February 2018 was produced following an appeal by both the appellant and the respondent. UTJ Rimington held that the appellant's sister was entitled to asylum as a member of a particular social

group in the light of the finding that she was a lone woman at risk of serious harm on return.

9. Returning to this appeal, the judge heard evidence from the appellant and from his mother. In his evidence the appellant confirmed that he had a wife living in Uganda who had a Somali passport and had been granted refugee status there. However, he said that this did not entitle him to live there as her husband. He had not applied for any documentation allowing him to do so as only people with valid passports could apply. He would have to go to Somalia to obtain a passport and it was not stable enough for him to do that. The appellant's mother also gave oral evidence. She confirmed that she had supported the appellant's two previous applications for a visa and that one of her mother's friends had paid for his trip to the UK but she was now in the US.
10. The judge set out his assessment of the evidence in [38]-[58]. He said that in many respects he did not find the evidence of the appellant or his mother to be credible even applying the lower standard of proof. His mother had sought to claim that she had not been untruthful in her previous evidence and that was due to an error, possibly of the interpreter, when she first arrived and claimed asylum. The judge was not satisfied there was any possible basis on which he could conclude that the findings as to credibility made by Judge Naphthine were wrong. In short, he was satisfied that she was not an honest and credible witness [39-40].
11. So far as the appellant was concerned, the judge said that he was not satisfied that he was being entirely truthful. He found his evidence as to his clan membership to be extremely confused, maintaining the claim that he was from a minority clan, despite it being found earlier that he was not. His knowledge of the clan was distinctly lacking because he had left Somalia at a very early age; he claimed that his grandmother would have told him about his clan membership although he could remember nothing [41]. The judge also commented that the appellant claimed to have been supported by a friend of his grandmother and it was clear that considerable sums of money must have been paid for his journey to the UK and that the lady had now gone to the US. The judge said that it seemed unlikely that a woman who had provided such support to the appellant would lose contact entirely with him or his family and that evidence could have been obtained from her to confirm whether she was prepared to provide any further support in the event that he was returned to Somalia [42]. The judge also took into account the appellant's failure to claim asylum in a number of countries through which he had passed on his way to the UK [43]. However, he did accept his evidence that he had left Somalia at a very young age and had not returned since. He also accepted that he no longer had any family members in Somalia [44].
12. The judge then commented that the appellant was a young, fit man who had carried out some sort of work in Uganda and, as indicated by his journey to the UK through numerous other countries with the use of a false passport, he had shown himself to be resourceful.

13. The judge went on to consider the country guidance in MOJ, noting that since the date of the hearing that decision had been the subject of consideration by the Court of Appeal in Secretary of State v FY (Somalia) [2017] EWCA 1853. The judge set out extracts from that judgment in [47] and [48].
14. The judge summarised his conclusions by saying that he was not satisfied that the appellant was from a minority clan but he accepted that his lack of family members was perhaps of more significance than clan membership. He was not satisfied that he would not benefit from remittances from abroad as he had benefited from considerable financial support in the past and he had not satisfied him that no support would be available in future [49]. He was a healthy, young man who had shown himself to be resourceful. The judge found he had good prospects of securing a livelihood, whether from employment or self-employment, and had not explained why he would be unable to access the opportunities now available in Somalia [50].
15. The judge said that he took account of the matters set out in Ms Bond's (who also appeared before the FtT) skeleton argument as to recent atrocities but it was not suggested that the appellant was himself at particular risk of persecution, that he would be targeted in any way or that all civilians were at risk simply by reason of being there. He found that there was no persuasive evidence to which he was referred that would lead him to conclude that the economic opportunities found by the Upper Tribunal in MOJ no longer existed [51]. Applying the country guidance, he said that he was not satisfied that the appellant was at real risk of persecution or other serious harm if returned to Somalia [52].
16. He also noted that the appellant's evidence was to the effect that he could not reside in Uganda with his wife who had refugee status there because he did not have a Somali passport. It seemed to him that he could return to Somalia and obtain a passport and that may, in any event, entitle him to live safely in Uganda with his wife [53]. The judge then turned briefly to consider article 8 but found that the appellant was unable to meet the requirements of the Rules and there were no compelling circumstances to displace the presumption in favour of the maintenance of effective immigration control [54]. Accordingly, he dismissed the appeal on all grounds.

The Grounds of Appeal and Submissions.

17. The grounds of appeal in substance raise three issues. Firstly, it is argued that the judge failed to give the parties an opportunity of making submissions on the relevant legal authority relied on in the decision, FY. It is argued that this failure to give the parties an opportunity to address him on that judgment was a material error of law as it went to the fairness of the proceedings.
18. Secondly, it is argued that the judge failed to apply the country guidance in MOJ to the facts of the appellant's appeal and that he failed to conduct a careful assessment of all the circumstances, in particular, failing to explain why he concluded that the appellant would benefit from remittances from abroad when his nuclear family in the UK were dependent on public funds to support themselves and he ought to have

found that there was a real possibility that the appellant would have no alternative but to live in makeshift accommodation in an IDP camp, where there would be a real possibility of having to live in conditions falling below acceptable humanitarian standards.

19. It is further submitted that the judge had failed to give a proper, reasoned basis for his conclusion that the appellant would have good prospects of finding employment when he had only worked for a brief time in a shop and had no skills which would help him find employment in Somalia. He had given evidence that he would have no accommodation, no job and nowhere to go and that he was being helped in the UK by his mother who was dependent on the appellant's stepfather. It is further argued that there were current humanitarian issues in Somalia which meant that it was likely that the appellant would have to live in conditions falling below acceptable humanitarian standards.
20. Thirdly, it is argued that the judge erred in his approach to credibility and the appellant did not understand why the judge had said that he maintained his claim that he was a member of a minority clan, despite it being found earlier that he was not. This was the appellant's first appeal and there had been no previous finding that he was not a member of a minority clan. Adequate reasons had not been given for this part of the decision.
21. The hearing before me, Mr Tufan produced two further judgments of the Court of Appeal, Secretary of State v Said [2016] EWCA Civ and Secretary of State v MA (Somalia) [2018] EWCA Civ 994. There was a short adjournment so that Ms Bond could consider these authorities before making her submissions.
22. Ms Bond submitted that if she had had the opportunity of making submissions on FY, there was a real possibility that they would have affected the outcome of the appeal. The appellant was someone who had no family support and no means of employment and this could have led to a finding that there was a real possibility that he would face the prospect of living in circumstances falling below what was acceptable in humanitarian terms. There would be a real risk of him having no alternative but to live in make-shift accommodation which may or may not be in an IDP camp and having to live in conditions falling below acceptable humanitarian standards. In FY the First-tier judge had accepted that that was the position at least to the lower standard of proof and the Court of Appeal had held that that finding was not perverse.
23. She accepted that in MA the Court of Appeal had said that, in so far as there was a conflict between the decision in FY and the judgment in Said, the decision in Said should be followed. She had sought to make enquiries on whether Said had in fact been cited in FY but had been able to obtain that information. However, there is nothing in the judgment in FY to indicate that Said was cited.
24. She further submitted that in the present appeal the issue did not simply relate to the appellant's economic circumstances but there were other factors that the judge had not properly taken into account as highlighted in her skeleton argument. It was not

sufficient simply to say as the judge did in [51] that it was not suggested that the appellant was not at particular risk of persecution or that he would not be targeted in any particular way. Those issues were not dispositive. There was wider evidence about the humanitarian situation in Somalia which the judge did not adequately deal with. The background evidence referred to an impending humanitarian crisis and to the influx of displaced persons into Mogadishu. The judge, so she submitted, had failed to consider the wider background in addition to issues of economic hardship.

25. Mr Tufan argued even if further submissions had been made on FY, the judge would inevitably have come to the same conclusions. FY had been considered in MA. If FY was being read as supporting a proposition that it was sufficient for the purposes of coming within article 3 to show that a person returning to Somalia was at real risk of having to live in an IDP camp, that contradicted the judgment in Said which was the authority to be followed. There was no substance in the argument that the judge had not followed MOJ. He had clearly identified why he came to the view that the appellant would be able to obtain employment in Mogadishu and would have access to support from abroad.

Assessment of the issues.

- 26 I must assess whether the judge erred in law such that the decision should be set aside. The judge referred to and cited from the judgment of the Court of Appeal in FY, an appeal decided after the date of the hearing without giving the parties an opportunity of making submissions on the relevance or otherwise of that judgment. In the grounds, it is simply argued that the failure to give the parties an opportunity of addressing him on the judgment was a material error of law as it went to the fairness of the proceedings.
27. However, that submission can only succeed if any further submissions could have had a material bearing on the outcome of the appeal. The passage cited by the judge at [47], simply sets out the relevant country guidance from MOJ and the passage at [48] deals with the challenge to a finding that the appellant in that case would not be able to obtain employment on return to Somalia. I need not set out those passages again. The view the Court of Appeal took of the challenge to the judge's finding about the appellant's prospects of employment was that this was a straightforward attack on a finding of fact and that the finding was not perverse, even if another judge might have made a different finding on that issue.
28. The argument Ms Bond sought to develop was that it was implicit that the Court of Appeal was accepting that where an appellant faced the prospect of living in circumstances falling below what was acceptable in humanitarian terms, that would meet the requirements of article 3.
29. However, this argument had been rejected by the Court of Appeal in Said. Having reviewed the relevant authorities including MSS v Belgium and Greece 53 EHRR 28, Sufi and Elmi v United Kingdom 54 EHRR 209 and GS (India) v Secretary of State [2014] EWCA Civ 40, Burnett LJ said at para 18:

“These cases demonstrate that to succeed in resisting removal, on article 3 grounds on the basis of suggested poverty or deprivation on return which are not the responsibility of the receiving country or others in the sense described in para 282 of Sufi and Elmi, whether or not that deprivation is contributed to by a medical condition, the person liable to deportation must show circumstances which bring him within the approach of the Strasbourg Court in the D and N cases.”

30. In MA the Court of Appeal considered whether the risk of deprivation on return would lead to a violation of article 3 and in the context of an argument that the decision of the Court in FY could be read as departing from Said, held at [64] that to the extent that there was any conflict between the decision of the Court in Said and in FY, the decision of the Court in Said should be followed.
31. However, in the present appeal the judge found that he was not satisfied the appellant would not obtain benefit from remittances from abroad as he had benefited from considerable financial support in the past and that he had good prospects of securing a livelihood. By necessary inference the judge was not satisfied that there was a real risk of the appellant having to live in an IDP camp or in conditions falling below humanitarian norms. I am therefore not satisfied the arguments based on the judgment in FY have any material bearing on the outcome of the present appeal nor, when analysed do the judgments in Said and MA.
32. The second ground relied on is the argument that the judge did not in fact apply the country guidance in MOJ. I am not satisfied that there is any substance in this ground. The judge set out the essence of the guidance in [47] citing from the judgment in FY. There is no reason to believe that the judge did not consider the factors identified there. In the grounds it is argued that he failed to explain why he concluded that the appellant would benefit from remittances from abroad when his family were in the UK but this ignores his findings in [42] and [49]. Similarly, it is argued that he ought to have found that there was a real possibility that the appellant would have no alternative but to live in makeshift accommodation in an IDP camp but again that ignores his findings of fact in relation to the financial support the appellant might receive and his good prospects of securing his livelihood. The grounds also argue that this finding was not open to the judge given that the appellant had only worked for a brief time in a shop and had no skills to help him find employment. To adopt the words used by the Court of Appeal in FY, these are straightforward attacks on findings of fact that the appellant does not agree with and which were for the judge to assess. I am satisfied that his findings were properly open to him and were not perverse.
33. It is further argued that there are current humanitarian issues in Somalia making it likely that the appellant would have to live in conditions falling below acceptable humanitarian standards. The judge was aware of the submissions referring as he did in [51] to the matters set out in the skeleton argument. Again, these were issues of fact for the judge to assess in the light of the evidence as a whole and the current country guidance. Ms Bond emphasised that the appellant’s argument was not simply based on economic considerations alone but on other factors, but I am satisfied that the judge was well aware of these issues and was entitled to find that there was insufficient

evidence to justify departing from the country guidance and that there were no features particular to the appellant which might put him at risk.

34. The third ground argues that the judge's approach to credibility was flawed, making the specific point that the appellant did not understand why the judge said that the appellant maintained his claim that he was a member of minority clan despite it being found earlier that he was not and that this was the appellant's first appeal. It may be that the judge's comment arises from his consideration of the two authorities relating to the appellant's sister which were produced in evidence where it was found that she was not a member of the minority clan and, assuming that he and his sister are full siblings, it would follow that the finding in relation to his sister would be indicative of his clan membership. However, that finding would not be determinative in that it would be open to being displaced by further evidence which was not in front of the previous judge. In the present case, the appellant gave evidence about his clan membership, but the judge rejected it for reasons which he has set out. There is no substance in the argument that the judge's findings on credibility were flawed.
35. In summary, I am satisfied that the judge's findings and conclusions were properly open to him for the reasons he gave. He followed the guidance in MOJ. The fact that he referred to FY without giving the parties a further opportunity of commenting did not have any material bearing on the outcome of the appeal.

Decision.

36. The First-tier Tribunal did not err in law in any way requiring the decision to be set aside.
37. The anonymity order made by the First-tier tribunal remains in force until further order.

Signed: H J E Latter

Dated: 25 May 2018

Deputy Upper Tribunal Judge Latter