SECOND DIVISION, INNER HOUSE, COURT OF SESSION

Lord Justice Clerk
Lord Clarke
Lord Drummond Young

[2010] CSIH 22
XA202/08

OPINION OF THE COURT

delivered by LORD DRUMMOND YOUNG

in Application for Leave to Appeal

under section 103(1) of the Nationality, Immigration and Asylum Act 2002

by

M.M.R

Appellant;

against

a decision of the Asylum and Immigration Tribunal

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Act: Winter, Solicitor Advocate; McGill & Co
Alt: Lindsay; Solicitor to the Advocate General

3 March 2010

[1] The applicant arrived in the United Kingdom on 6 June 2007 and claimed asylum. Her application for asylum was refused by officials acting on behalf of the Home Secretary on 13 November 2007, and a decision was made to remove her from the United Kingdom as an illegal immigrant. The applicant then appealed to the Asylum and Immigration Tribunal. On 8 January 2008 an Immigration Judge refused her

appeal. Thereafter she made an application for reconsideration of that decision. This was refused by a Senior Immigration Judge but granted by the Court of Session, and an appeal hearing was held before a Senior Immigration Judge. On 23 September 2008 he decided that the Immigration Judge had not made any material error of law, and that his determination dismissing the applicant's appeal should stand. The applicant has now made an application to the Court of Session under section 103B(1) of the Nationality, Immigration and Asylum Act 2002 for leave to appeal against the decision of the Senior Immigration Judge. When the case called before us for determination we agreed to treat the application for leave to appeal as an appeal, and heard argument on the merits of the applicant's challenge to the decision of the Asylum and Immigration Tribunal.

[2] The appellant's claim is that she is from Somalia and is a member of the Bajuni clan. The Bajuni are a minority clan in Somalia, and live in the south of the country along the coasts and on offshore islands. Bajuni also live in Kenya. The country guidance on Somalia indicates that members of the clan resident there are liable to suffer persecution at the hands of the majority clans, the Darod and Hinwiye, a fact that is accepted by the Home Secretary. The appellant was born on 16 June 1989, she alleges in the southern Somali town of Kismayo. She claims that she lived in Kismayo with her parents, sister, brothers and an uncle, but in 2003 her parents were both killed by members of the Darod clan. Thereafter she and the remainder of her family, including her uncle, fled to Kenya, using the services of an agent. In Kenya they stayed in the house of the agent in Mombasa for over four years. The applicant's uncle died, and the agent then told her that she must leave his house. She then spent five months living in a mosque before the agent took her to Nairobi and then to Yemen, where she took a flight to the United Kingdom and claimed asylum on arrival.

[3] The Immigration Judge noted that the appellant was able to speak Kibajuni, the Bajuni language, fluently. She was also able to speak Swahili. She claimed that she learned to speak Swahili when she was in Kenya from the members of the household in which she was staying. Swahili is of course the lingua franca of Kenya, notably the coastal regions. She was only able to speak a few words of Somali. In that respect, she claims that she was educated at a madrassa between the ages of five and fourteen, but was allowed out of the house only to attend the madrassa; consequently she did not learn Somali. The evidence available to the Immigration Judge indicated that 50 per cent of the Bajuni in Kismayo and islands off the Somali coast are able to speak Somali, but the vast majority of those who understand Somali are from the mainland. In one report, it was indicated that all of the younger generation of Bajuni living on the mainland (which includes Kismayo) were able to understand and speak Somali.

[4] In his written determination, that Immigration Judge followed the approach laid down in *AJH* (Minority group-Swahili speakers) Somalia, CG (2003) UKIAT 00094. From that case he concluded that, if the applicant were Bajuni, she would be liable to face persecution on return to Somalia and could not reasonably relocate. That was particularly the case for females. *AJH* also set out the matters that should be taken into account when considering whether a person is Bajuni. Three factors are of particular relevance: knowledge of Kibajuni, knowledge of Somali, although that might vary depending upon the person's own history, and knowledge of facts about Somalia and the Bajuni. Nevertheless, the assessment should not treat any of these three factors as decisive.

[5] The Immigration Judge gave consideration to each of those three factors. He held that the applicant clearly had knowledge of Kibajuni. She had no knowledge of Somali beyond a few words. The Judge considered that that counted against her

account of her personal history, in view of the indication in the country reports that all of the younger generation of Bajuni on the mainland were able to speak Somali. The applicant had stated in her asylum interview that only townspeople can speak Somali, but, as the Judge pointed out, she came from the town of Kismayo and lived there until she was 14. Moreover, she had attended the madrassa school for eight or nine years. In relation to the third factor, knowledge of life in Somalia for the Bajuni, the Immigration Judge considered that she had some knowledge but that there were nevertheless areas where her knowledge was not good. These related to such matters as her knowledge of currency and of countries bordering Somalia. Perhaps more significantly, at her screening interview she did not know the majority clans who persecuted the Bajuni, but she had this knowledge a few weeks later at her asylum interview. The Judge did not accept her explanation that she was nervous at the first interview, and indicated that even if she were he would have expected her to have known a matter of such an important nature. Furthermore, she explained that it was her uncle who had told her that the clans in question were the Darod and the Hawiye, but her uncle had died before she left Kenya. A number of other significant gaps in her knowledge of the Bajuni and their persecutors were identified. The Immigration Judge's conclusion was that he was concerned as to the knowledge of the applicant concerning the Bajuni.

[6] Thereafter the Immigration Judge discussed other matters of credibility. First, there had been a discrepancy in the applicant's account as to whether or not she had gone to school. At one point she said that she had not. At another point she said that she had been to the madrassa school for eight or nine years. Her explanation that she did not regard it as a school because it was of a religious nature was not considered satisfactory. Secondly, the applicant's account of her life in Kenya was thought by the

Judge to create major credibility problems. She indicated that she and members of her family had stayed with an agent for four years in Kenya. The Judge thought it most unlikely that an agent, who was presumably paid, would keep the family for such a lengthy period of time before taking action to get them away. The applicant had been unable to offer any explanation for this, and the Judge could not think of any explanation. The applicant had claimed that she and her family remained in the house without coming out for fear of the Kenyan authorities, but that also created a credibility problem, as there are large numbers of Somali refugees in Kenya. Yet a further credibility problem arose from the applicant's claim that after her uncle died the agent told her that she would have to leave the house, because there was not enough room for her, and took her to a mosque. Finally, in relation to this part of the applicant's story, the Judge commented that the agent apparently decided to take the applicant alone to the United Kingdom without the rest of her family, and the applicant was unable to cast light on why that was so. Thirdly, the Immigration Judge was concerned at the applicant's explanation of her ability to speak Swahili; she stated that she had learned it in Kenya from people who lived in the agent's house and in particular the agent's family. She had, however, indicated that in the house she really only spoke to her own relatives, and she had stated that she rarely spoke to the people with whom she lived in the mosque.

[7] The Immigration Judge concluded that he did not believe the applicant's account of what had happened to her. His precise conclusion is important for the purposes of the present application, and we will set it out in full. At paragraph 40 of his determination, he stated:

> "I added the general credibility concerns [relating to the applicant's life in Kenya] to the matters which I am obliged to consider with regard to the

> Appellant in accordance with the case of *AJH*. While she did speak Kibajuni, she did not speak Somali and I did not regard her knowledge of the situation of Bajuni in Somalia as adequate. As indicated above, I had general credibility concerns. Taking all of these matters into account I concluded that the Appellant had not demonstrated to the required standard that she was a Bajuni from Somalia. Further, I concluded that she was not a member of a minority clan from Somalia. Accordingly, I did not believe her account".

In these circumstances, the Immigration Judge held that the applicant's asylum claim failed; in the light of his findings, he did not consider that she was at real risk of suffering serious harm or breach of her protected human rights in Somalia.

[8] An order for reconsideration was made subsequently by a Lord Ordinary. He rejected all but one of the grounds for reconsideration stated by the applicant. That ground was that the Immigration Judge had not regarded the Country Guideline case of *NM and Others* (Lone Women-Ashraf) Somalia CG [2005] UKIAT 00076. That case was not in fact drawn to the attention of the Immigration Judge by the applicant's representatives, and a new representative had noticed the omission. On the basis of the failure to consider *NM*, the Lord Ordinary considered that the Judge might have made a material error of law. The question for the Senior Immigration Judge who heard the petition for reconsideration was accordingly whether, by omitting to have regard to the decision in *NM*, the Immigration Judge had made a material error of law.

[9] The Senior Immigration Judge concluded that there was no such error of law. He reviewed the Immigration Judge's written determination at some length. He then stated that the submission for the applicant was that the Immigration Judge did not make a clear finding as to whether or not the appellant was a Somali, and that it was

unclear whether he found that the appellant was not a Bajuni but was from Somalia. That submission was rejected. The Immigration Judge had made adverse credibility findings against the applicant in respect of both her alleged ethnic origins and her alleged experiences in Kenya. On the basis of these adverse findings, the Immigration Judge had concluded that the applicant had not made out her claim to asylum. Although the Immigration Judge had referred to Somalia, it did not follow from his decision that the applicant would be returned to Somalia, or that she was a national of that country. The Senior Immigration Judge referred to the finding of the Immigration Judge that the appellant's asylum and human rights claims were not credible and continued (at paragraph 18):

> "It is clear from this that not only did the Immigration Judge not accept the appellant's claimed ethnicity, nor her account of her experiences in Kenya, but he did not find credible the appellant's claim to be of Somali origin or nationality. It was not necessary for the Immigration Judge to set this out in specific terms as it follows from his conclusions at paragraphs 40 to 42 of his determination".

The Senior Immigration Judge then considered the implications of *NM and Others*, and quoted an observation (at paragraph 123 of the determination) to the effect that a problem arises in relation to an applicant for asylum whose case has been so disbelieved that it is not known what their clan or place of origin is. In such a case it was difficult to see how the applicant could succeed, as he or she would in effect be declining to demonstrate, even to the low standard of proof, that they were at risk on return. The Senior Immigration Judge stated that it is clear from those observations that the Tribunal had envisaged the possibility that evidence was so lacking in credibility that no findings could be made about clan membership or the availability

of a place of safety. In such cases the Tribunal was not expected to find that an applicant qualified for refugee protection or humanitarian protection.

[10] The Senior Immigration Judge held that that issue was relevant to the present applicant. Her evidence that she was a Somali of Bajuni ethnicity had been comprehensively rejected as lacking in credibility. It was not then incumbent upon the Immigration Judge to consider whether she as a lone woman might nevertheless be at risk on return to Somalia. The burden lay upon the applicant to show that she qualified for protection because of a real risk of persecution, or serious harm, or some other breach of her protected human rights. If her evidence is disbelieved and she cannot establish this, then her claim fails. It is not for the Tribunal to replace that discredited evidence with conjecture about whether she might be at risk on the basis of circumstances or factors that were not supported by evidence; to do so would be mere speculation. On this basis the issues arising in *NM* as to the dangers for lone women returning to Somalia did not arise in the present case.

[11] Before this court Mr Winter, who appeared for the applicant, prepared a written submission in which he stated a number of grounds of appeal. In the event only the first of these was argued, because he accepted that if he failed on that ground the others were irrelevant. Moreover, Mr Lindsay, who appeared for the Home Secretary, conceded that if the first ground of appeal were rejected the case should be remitted to the Tribunal for further consideration in the light of *NM*. The applicant's first ground was that the Tribunal had materially erred in law in failing to hold that the Immigration Judge did not make clear his finding as to whether or not the applicant was Somali. That was critical because, if the applicant were in fact from Somalia, an assessment would be required as to her position as a lone female when she returned to Somalia. For that reason a clear finding was essential. It was submitted that the

Tribunal, in holding that the Immigration Judge's decision was sufficiently clear, read words into it in a manner that was not permissible.

[12] In our opinion the Immigration Judge's conclusions as to the applicant's national origins are sufficiently clear from his determination. Consequently there is no error of law. Those conclusions are stated in particular at paragraph 40 of the determination, quoted above at paragraph [7] of this Opinion. The Immigration Judge specifically held that the applicant had not demonstrated that she was a Bajuni from Somalia, nor a member of any minority clan from Somalia. It might be said that logically this leaves open the possibility that the applicant was a member of one of the majority clans in Somalia. Nevertheless, the fact that she could not speak more than a few words of Somali, taken together with her fluent Kibajuni, makes this most unlikely; the fluency of her Kibajuni clearly suggested that she was indeed an ethnic Bajuni, as she claimed. Another possibility is that she was an ethnic Bajuni from somewhere other than Somalia; in the Immigration Judge's decision there are indications that substantially more Bajuni live in Kenya than live in Somalia. The Immigration Judge could not, however, speculate as to where, other than Somalia, the applicant might have come from. All that he had to consider was whether she made out her claim to be a Bajuni from Somalia. We are of opinion that he made it clear that he rejected that claim as incredible, and that is sufficient to reject the applicant's first ground of appeal.

[13] The Senior Immigration Judge reached the same conclusion at paragraph 18 of his decision: see paragraph [9] above. We should add that the conclusion reached by the Immigration Judge, that the applicant was not of Somali nationality, was fully justified by the facts found by him in his determination. Moreover, in view of his very clear finding that the applicant's account of events was wholly lacking in credibility, it

is quite impossible to go behind that conclusion. To do so would be to speculate in the absence of any credible evidence. That is something that a judge should not do. Ultimately it is for the applicant to satisfy the Asylum and Immigration Tribunal that she is at risk of persecution. A critical part of her case was that she was a Somali. Once that had been rejected, her case fell away completely, and there is nothing to put in its place.

[14] The rejection of the applicant's claim to asylum does not mean that she will be returned to Somalia. A removal direction must be made, and in view of the finding that she is not a Somali it would be remarkable if the direction were to send her to Somalia. In any event, she has the right to appeal against any removal direction, and can be expected to do so if the direction were that she should return to a country where she is likely as a lone female to be at serious risk.

[15] Finally, we must thank both Mr Winter and Mr Lindsay for their clear and succinct submissions, which greatly assisted our consideration of this case.