

**Neutral Citation Number: [2009] EWCA Civ 466**  
**IN THE SUPREME COURT OF JUDICATURE**  
**COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE ASYLUM AND IMMIGRATION TRIBUNAL**  
**[AIT No: IA/01807/2008]**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: Tuesday, 17<sup>th</sup> March 2009

**Before:**

**THE MASTER OF THE ROLLS**  
**(SIR ANTHONY CLARKE)**  
**LORD JUSTICE TOULSON**  
**and**  
**LORD JUSTICE SULLIVAN**

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**Between:**

**KM (SOMALIA)**

**Appellant**

**- and -**

**SECRETARY OF STATE  
FOR THE HOME DEPARTMENT**

**Respondent**

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**Ms S Naik** (instructed by Dare Emmanuel) appeared on behalf of the **Appellant**.

**Mr V Sachdeva** (instructed by the Treasury Solicitor) appeared on behalf of the **Respondent**.

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**Judgment**

## **Lord Justice Toulson:**

1. This application for permission to appeal was referred to the full court by Mummery LJ with a direction that if permission were granted the hearing of the appeal should follow immediately. The appellant is an asylum seeker who claims to be a citizen of Somalia from the island of Ngumi, off the southern Somali coast, and a member of the Bajuni community. The Bajuni are an ethnic community who live along the part of the coast of East Africa and are not confined to Somalia. The report of an expert, to which it will be necessary to make further reference, stated that he had encountered Bajuni fishermen as far south as the Lamu archipelago in Kenya. The Bajuni language, KiBajuni, is a dialect of KiSwahili. The Secretary of State does not accept that the appellant comes from Somalia, and that issue lies at the heart of this appeal.
2. The history is lengthy and tortuous. On 27 July 2003 the appellant arrived in the United Kingdom from the Yemen and claimed asylum on arrival. By letter dated 30 August 2003 his application was refused. The basis of the refusal was that the Secretary of State did not believe that he was either a Bajuni or from Somalia.
3. There was no appeal against that refusal. Instead, on 5 December 2005, the appellant made another asylum claim using a false name. Fingerprint evidence led to his detection. He was arrested and on 16 December 2005 at Croydon Crown Court he was convicted of attempting to obtain leave to remain by deception. He was sentenced to eight months' imprisonment and the court made a recommendation of deportation.
4. On 12 April 2006 the appellant was notified that the Secretary of State had decided to make a deportation order. There was no appeal against that decision and on 10 January 2007 a minister signed a deportation order in the usual form. On 26 February 2007 the appellant submitted a fresh asylum claim, supported by the expert report of Dr Mark Faulkner, who holds an academic position at the School of Oriental and African Studies, and has specialist knowledge of East African life. The Secretary of State refused to accept this as a fresh claim. The appellant applied for judicial review. Those proceedings were compromised. On 30 October 2007 a consent order was made, by which the appellant's representations were to be treated as a fresh application for asylum and as an application to revoke the deportation order.
5. On 16 January 2008 the Secretary of State refused the applications. The decision letter addressed his claim in some detail and set out a large number of features which caused the Secretary of State to disbelieve the appellant, over and beyond the fact that he had acted fraudulently in making a false asylum claim. In paragraph 10 the letter stated that the discrepancies in his account cast significant doubt on his claim to be either a Bajuni or a Somali national. The claim for asylum was rejected, in paragraph 24, on the basis that he was not a Somali national. His application to revoke the deportation order was also refused on the same basis, and so too was his claim for humanitarian protection. The appellant appealed against the Secretary of State's decision.

The matter first came on for hearing before a panel of the AIT, which dismissed the appeal, for reasons promulgated on 25 February 2008. The appellant applied for reconsideration. The essential grounds of the application were, first:

“Basically the tribunal has not challenged the basis of the conclusion of the expert but has based its decision on the adverse credibility findings about the appellant’s claims. The danger in this approach could be that the appellant may not be credible in the story he had told but may be credible on his claimed ethnicity as corroborated by the expert report, in which case he would clearly be at risk should he returned to Somalia as he would have no militia clan protection.”

and secondly: “the Tribunal have not given adequate reasons for rejecting the conclusions, albeit tentative, of the expert.”

6. On first-stage reconsideration it was decided that the Tribunal had erred and directions were given that the matter should proceed to second-stage reconsideration. The Designated Immigration Judge who dealt with the matter at that stage said as follows:

“The expert report is evidence that the appellant is Bajuni and is able to speak Kibajuni as a native. However, as stated by the tribunal in AJH, the fact that an appellant is Bajuni and speaks kiBajuni may not necessarily be determinative of their appeal. It is necessary for the Tribunal to have regard to the factors identified in AJH and other country guideline cases of which knowledge of the Bajuni and ability to speak kiBajuni are but two factors. The expert report is not evidence as to whether the appellant speaks Somali or has knowledge of matters to do with life in Somalia. These issues need to be addressed and therefore a stage two consideration is required.”

7. In AJH (Minority group-Swahili speakers) Somalia CG [2003] UKAIT 00094 the Tribunal had said, at paragraph 33:

“What is needed therefore in cases in which claims to be Somali nationals of Bajuni clan identity are made is first of all: (1) an assessment which examines at least three different factors

- (a) knowledge of Kibajuni;
- (b) knowledge of Somali varying depending on the person’s personal history; and
- (c) knowledge of matters to do with life in Somalia for Bajuni (geography, customs, occupations etc).

But what is also needed is (2) an assessment which does not treat any one of these factors as decisive”

8. In the present case there was no claim by the appellant to speak Somali, but other relevant factors included his knowledge of Kibajuni and his knowledge of matters to do with life in Somalia for Bajuni. Miss Naik on behalf of the appellant is critical of the Senior Immigration Judge for saying that the expert’s report did not deal with the latter matter. It is not necessary to explore that issue further because the Senior Immigration Judge certainly flagged it up as a matter which needed to be examined and assessed on reconsideration.
9. Prior to the matter going to second-stage reconsideration, the expert, Dr Faulkner, produced a further report, apparently as a result of a direction from the Tribunal. The first report had been prepared on the basis of a telephone interview. The second report was prepared after a meeting between the expert and the appellant.
10. Second-stage reconsideration took place before Immigration Judge Atkinson on 1 September 2008. For reasons promulgated on 5 September 2008 he dismissed the appeal. He accepted that the appellant was a member of the Bajuni community, but did not accept that he came from Somalia. The present challenge is to that decision. The Immigration Judge also dismissed the appellant’s appeal in relation to humanitarian protection and the deportation order, but no separate argument has been addressed in relation to those issues.
11. Miss Naik makes essentially three criticisms of the Immigration Judge’s determination. First, she submits that he failed to do the exercise which had been specifically highlighted as necessary: that is to say, to assess the factors identified in AJH in reaching a conclusion whether the appellant was a Bajuni from Somalia. Secondly, she submits that what the Immigration Judge did instead was to examine the narrative account given by the appellant and to reach adverse credibility findings on the basis of that narrative account. He then fell into the same error as the Tribunal had earlier done by effectively transposing that conclusion into a finding that his claim to be a Bajuni from Somalia was just as incredible as his narrative account of events whereas the one did not logically follow from the other. Thirdly, she submits that the Immigration Judge, like the previous Immigration Judge, failed to address satisfactorily the points advanced by Dr Faulkner for supporting the claim by the appellant that he was a Bajuni from Somalia.
12. The key part in the Immigration Judge’s determination runs from paragraph 30 through to 39. The appellant had given evidence at the hearing. He does not appear to have been asked any questions at all about his knowledge of Somalia or about the answers which he had given when previously questioned on that subject. Cross-examination appears to have been directed more to the credibility of his narrative account of events leading to his going to the Yemen. Perhaps for that reason, the Immigration Judge began his findings of fact by addressing the appellant’s narrative account of events. From paragraphs 30 to 35 he set out four reasons for disbelieving the appellant’s

narrative account. It was argued before the Immigration Judge by the appellant's representative that these matters did not go to the key issue, which was whether the Secretary of State had been right to refuse his application on the basis that he was not a Somalian. The Immigration Judge commented on that submission at paragraph 36:

“I find that all the above matters tend to undermine the credibility of the appellant's account. I reject Mr Adewoye's submission that matters relating to the appellant's account and events in Somali are not material because they do not go to the core issue, which, he further submits, relate to questions of ethnicity and language as dealt with by Dr Faulkner's report. That submission is flawed because it fails to take into account the fact that questions of ethnicity and language are not determinative. In particular as is well understood from the objective materials, members of the Bajuni community live not only in Somalia but also in Kenya.”

13. The Immigration Judge was right that mere determination that the appellant was a Bajuni would not be sufficient to determine whether he had established, on the relative low standard of proof, that he came from Somalia and to that extent the submission advanced was flawed, if the submission was as the Immigration Judge understood it. However, the Immigration Judge did not in that paragraph deal to my mind satisfactorily with the more fundamental point being made that if the appellant had lied in his narrative account of events, that in itself did not make it more or less probable that he was a Bajuni from Somalia or a Bajuni from Kenya. Those were the two realistic alternatives, because it was accepted that he was a Bajuni from a fishing community, and the only places where Bajuni fishermen would be likely to be living would be Somalia or Kenya. The Immigration Judge went on to observe that in assessing the credibility of the appellant he must look at all the evidence in the round. He turned then to Dr Faulkner's reports. He said of that evidence, at paragraph 38:

“I accept the evidence of Dr Faulkner so far as it relates to the appellant being a member of the Bajuni community. However, I do not take Dr Faulkner's conclusion to be that the Appellant is necessarily from Somalia, nor that the Appellant's narrative account of events should be accepted. Of course, in any event that ultimate question is a matter for myself. I note that Dr Faulkner at an early stage in his report observes that members of the Bajuni community are not confined to living only in Somalia.”

14. As to the critical question whether the appellant came from Somalia the Immigration Judge said as follows:

“39. In the present case the Appellant’s account of events in his own area is inconsistent and implausible as noted above. Looking at the totality of the evidence, and considering the case in the round, I do not find the Appellant to be a credible witness. I do not find the evidence adduced by the Appellant to be reliable and reject all aspects of the Appellant’s account which are put in issue by the Respondent save that the Appellant is a member of the Bajuni community.”

15. Taking the first of the criticisms made by Miss Naik, it is clear that the Immigration Judge nowhere expressly directed himself to the issues flagged up in AJH and by the Senior Immigration Judge when ordering second-stage reconsideration. The appellant’s capacity to speak Somali was irrelevant since it was not asserted, but his knowledge of the Bajuni way of life in Somalia was highly relevant. On behalf of the respondent Mr Sachdeva submitted that the Immigration Judge did consider it and that his assessment is to be found rolled up in the final part of paragraph 39, where he refers to considering the case in the round and rejecting all aspects of the account except those which were unchallenged by the respondent. Mr Sachdeva pointed out that there were a number of features which had been identified by the Secretary of State in the refusal letter which cast doubt on his knowledge of Somalia: in particular, he claimed to have no memory of life before the civil war, although he would have already been a young teenager when that had occurred; he had, as he admitted, no ability to speak Somali; and he had patchy knowledge of the local geography. It is Mr Sachdeva’s submission that by the language which the Immigration Judge used he was accepting the Secretary of State’s assessment and adopting it as his own.
16. I am not for my part persuaded by that argument. There needed to be an analysis of the factors which told in favour of the appellant’s claim to be a Bajuni from Somalia. Second-stage reconsideration had been ordered specifically in order that that should be done and it did not happen. The appellant had to establish a reasonable degree of likelihood that he was a Bajuni from Somalia. Given that there were only two possible places where Bajuni fishermen might realistically come from, namely Kenya or Somalia, if the Immigration Judge was concluding that there was no reasonable degree of likelihood that he came from Somalia, an analysis explaining what led him to that conclusion needed to be given. It was not.
17. That in my judgment in itself is sufficient to compel the conclusion that the decision cannot stand, but I refer briefly to the other two criticisms made. There does seem to me to be real force in the point made by Miss Naik that the Immigration Judge has approached the matter by concluding that the appellant was an inveterate liar and therefore his claim to come from Somalia was to be disbelieved. Credibility of course had a relevance in the general sense that if a person claims to be of a certain nationality, and is somebody who is ordinarily speaking to be believed, that is a powerful ground to accept the claim made about their nationality. If their credibility is nil, then the fact that they claim to

be from Somalia of itself does not advance the case at all. But it is not the end of the case, as was properly conceded by Mr Sachdeva. The fact that the appellant had lied on numerous issues did not of itself make it more likely that he came from Kenya than from Somalia.

18. As to the third matter, the reports by Dr Faulkner were good examples of how an expert's report ought to be prepared. They were plainly objective. Dr Faulkner had the difficulty that he had no particular knowledge of Somalia and in particular south Somalia and the island of Ngumi. It is not an area where he or any of his colleagues would have been able to go for some years, and he made his limitations of his knowledge plain. He questioned the appellant as best he could. He was careful not to fall into the trap, as many so-called experts do, of playing the role of advocate. He set out dispassionately the information that he was able to give to assist the court. He set out in an even-handed way those factors which tended to support the appellant's credibility and those which gave rise to misgivings. It is argued by Miss Naik that it is implicit in his report that he came himself to the view on balance that the appellant's claim to be a Bajuni from Somalia was credible. Mr Sachdeva on the other hand says that it is quite clear that he expressed no view as to his national origin. The Immigration Judge was right to say that he did not indicate that the appellant necessarily was from Somalia. He indicated that the Bajuni spread either side of the border and that it was a rather artificial border.
19. Dr Faulkner was addressing the question whether the appellant was a Bajuni from Somali and I think a fair reading of his report suggests that he did at least implicitly think that that claim carried credibility, although he did not state in explicit terms that he believed that the appellant came from Somalia and he did properly highlight weaknesses in the appellant's case. The real point is that the matters which he identified needed to be properly addressed by the fact-finder in the way that unfortunately they were not addressed. Mr Sachdeva has presented a powerful argument based on the various weaknesses in the appellant's case but they were not reasons which the Immigration Judge gave for reaching his determination.
20. With reluctance I therefore conclude that the determination must be set aside. I do so with reluctance, for two reasons. First, the history of deception by the appellant does not make his claim one that commands a great deal of sympathy, but the task of the court is not to give out sympathy or otherwise. It is to determine cases properly according to law. My second ground of concern is that this case has already taken an unconscionable time and I would propose to set aside this determination for reasons closely similar to those which led to reconsideration being ordered. That said, I see no alternative but to give permission to appeal, allow the appeal and order that the matter be remitted to an Immigration Judge for fresh reconsideration.

**Sir Anthony Clarke:**

21. I agree.

**Lord Justice Sullivan:**

22. I also agree.

**Order:** Application granted; appeal allowed, determination be set aside; the matter remitted to the AIT for fresh reconsideration