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BORGARTING COURT OF APPEAL

JUDGMENT 23.09.2011

The case concerns the validity of the Norwegian Immigration Appeals Board's (UNE) decision to reject the appeal regarding the expulsion of a Somali man, based on the view that an internal flight alternative would be available in the country of origin.

It concerns a young Somali man, born in 1985, who applied for asylum in Norway in 1997. He was not granted asylum but since his return could not be executed he was granted permission to stay on compassionate grounds. His parents are deceased but he has family members spread out in Norway and in other parts of the world, except for Somalia.

The applicant's temporary residence permit has been renewed several times since 1997. However, on 21 September 2005 the Norwegian Directorate of Immigration (UDI) made a decision to send him back to Somalia given that he had been sentenced for several robberies and attempts to robberies in Norway. The Norwegian Immigration Appeals Board (UNE) uphold the decision on 10 May 2007 and stated that it would not be a violation of the Norwegian Alien's Act to send him back to Mogadishu and that the applicant could, based on his clan affiliation, also take up residence in Puntland. The applicant's request for reassessment in May 2009 was rejected and UNE uphold its previous decision on 12 March 2010.

Later on the Oslo District Court stated in a judgment on 3 October 2010 that the applicant could not be deported to Mogadishu but that return to Puntland would, however, be feasible. The applicant appealed the judgment to the Borgarting Court of Appeal.

The applicant does not disagree with the court's statement that the conditions for expulsion are fulfilled. As such, expulsion would not be disproportionate considering the circumstances. However, both the applicant and the state consider return to Mogadishu to be impossible. The applicant further claims that there should be no room for misinterpretation that could negatively affect the individual in this case, especially since UDI and UNE have had diverging opinions regarding the interpretation of clan protection. In addition, UNE has changed its view regarding returns to Mogadishu.

The applicant claims that the protection against return should be assessed based on § 28 of the Norwegian Alien's Act (asylum), given that he was earlier granted permission to stay in Norway since he could not be returned to Somalia. Therefore, he should be

considered as having an ongoing asylum application. In addition, the reference to § 28 in § 73 of the Alien's Act (non refoulement) should imply that also the provision on IFA in § 28 (5) is applied in the same manner in connection to § 73.

There is a major difference between the proportionality assessment in § 70 (regarding expulsion) and the reasonable assessment in § 28 (5) on IFA. According to § 28 (5), only the aspects in relation to the return situation should be assessed (not the situation in the current country of residence). UNHCR's guidelines from 23 July 2003 on IFA should also be taken into consideration. In fact, the state has the burden of proof when assessing whether the applicant can safely return to his/her area of origin. The situation in the country of origin has to be analyzed at the time of the decision but a forward looking perspective is also necessary. According to UNHCR's guidelines on IFA one must consider the personal situation; whether the individual would be isolated or not upon return but also the human rights situation and the socio-economic circumstances at the place of return. It was stated that the applicant could not be sent back anywhere else than to Mudug in the south of Puntland, where his sub clan is residing. However, the applicant claims that return to Mudug is neither possible, given that he has no family there nor can he expect any support from his clan since he has not been in contact with them or supported them financially during his stay in Norway. The assumption that his siblings abroad could support him cannot be considered reasonable. Furthermore, he has not resided in Somalia in many years; he has also been westernized and has been addicted to drugs. In addition, the humanitarian situation in Puntland is unstable and alarming.

UNE has stated that the question regarding protection against return should be assessed based on § 73 of the Alien's Act. The expression "area" in § 73 (2) is not restricted to the area of origin. The provision makes no reference to § 28 (5), only to § 28 (1). It would be overlapping assessments of the reasonableness if, in an expulsion case, you would both assess the proportionality according to § 70 and the reasonableness according to § 28 (5). Furthermore, there is no ongoing asylum application. The applicant was not granted asylum in 1997 and a possible renewal of the residence permit would have been assessed based on § 38 (compassionate grounds) and not on § 28 (1) b. The assessment should therefore be limited to the grounds in § 28 (1) b (as referred to in § 73 (2)) and there was, at the time of the decision, no real risk for the applicant of being subjected to death penalty, torture or other inhuman or degrading treatment upon return to Puntland. Prohibition of return to Mogadishu was accepted.

In addition, the right to international protection is subsidiary and protection in another part of the country of origin than the individual's area of origin should be considered first. Mudug in Puntland is accessible and it would not be unreasonable to return the applicant to Puntland. Although the courts have a full right to assess land information they should be careful in overruling the assessment made by the authorities. Further, the applicant has possibilities to manage better than other IDP's upon return. He has a family abroad who can support him financially, he has been educated in Norway and he also belongs to a majority clan.

The Court of Appeal states that no party opposes the conclusion that the conditions for expulsion are fulfilled. The prohibition of return to Mogadishu is neither questioned. The issue to be solved is thus whether the applicant can be returned to another part of Somalia than the one he originates from.

The parties disagree on which provision of the Alien's Act to apply. The Court of Appeal has concluded that there is no ongoing asylum application. The question of return has been raised on the immigration authorities' initiative in connection to an expulsion case. Therefore the protection against return should be assessed based on § 73 of the Alien's Act. The central part of this provision is the second section and the reference to § 28 (1) b. § 73 contains, as opposed to § 28, no particular provisions regarding the situation when a foreigner cannot be returned to the area of origin. It is not specified what should be included in the term "area", neither is there any assessment regarding IFA. On the other hand, there are provisions stating that no one should be returned to a country from where he/she could be sent further to a third country where there is a risk for being subjected to death penalty, torture or inhuman or degrading treatment.

In the preparatory work of the new Alien's Act it is stated that the absolute protection against return according to § 73 only applies to persons residing in Norway on other grounds than § 28 and § 34 (mass influx) but who in connection to expulsion or equivalent has a need for protection. According to the Court of Appeal this clearly implies that the right to protection against return should be the same in § 28 and § 73 and, therefore, the concept of IFA in § 28 (5) should be assessed before deporting any person with a residence permit based on the fact that he/she could not be safely returned. The immigration authorities have, when deciding on expulsion of the applicant on 10 May 2007 according to the previous Alien's Act, assessed the need for protection against return according to the provisions on asylum including the provision on IFA and whether it is relevant, safe and reasonable. The Court of Appeal further notices that both parties agreed that the case should be assessed according to the provision on IFA in § 28 (5), which the District Court also did. The need for protection against return according to § 73 should therefore be assessed in the same way as according to § 28 (5). This is further established by practice and other preparatory work.

The applicant is protected from return to Mogadishu. However, the question is whether the applicant is in need of international protection in regards to Puntland if it can be considered a relevant, safe and reasonable alternative (§ 28 (5)). The application of § 28 (5) (IFA) is the same both in regards to asylum-seekers granted refugee status (§ 28 (1) a) and those granted subsidiary protection (§ 28 (1) b). There is no reason not to apply the provision on IFA also in other situations than § 28 (1) b when there is a risk for life or for facing inhuman treatment.

Norway is not legally bound by UNHCR's recommendations but they are nevertheless important instruments when assessing Norway's international obligations. In line with UNHCR's guidelines on IFA there should, in addition to the relevance test of the relocation alternative, also be an analysis of the reasonableness of IFA, i.e. whether the applicant can lead a relatively normal life without facing undue hardship in the intended

place if relocation. The applicant's personal circumstances, past persecution, safety and security, respect for human rights and possibility for economical survival must also be taken into consideration.

When considering IFA, the needs for protection against return must be analyzed based on the current situation but also by assessing future developments. Information acquired at a later stage may be given weight only if it reflects circumstances and tendencies UNE was aware of when making the decision. In 2007 and 2010 when UNE decided that the current applicant would be returned to Mogadishu, there were few reasons for thoroughly analyzing the concept of IFA and possible needs for protection in that regard. However, the concept is very sparsely developed which results in an overall insufficient analysis of IFA. As a principle, the courts should be careful for rejecting the assessment of land information made by the immigration authorities, who have particular knowledge in this field. This implies, however, that the requirements are higher on the authorities for making correct analyses, which were, according to the court, not made in the decision from 12 March 2010.

The actual question is whether the applicant can receive clan protection in the northern parts of Mudug where his sub clan is residing. It appears that clan members who have been abroad several years without keeping contact or supporting the clan financially cannot expect to be protected upon return. The fact that UNE has not concretely assessed the applicant's possibilities to receive clan protection in this complex situation weakens the decision according to the Court of Appeal. Furthermore, UNE has neither analyzed the general situation of IDP's in Puntland and especially in Mudug. Reportedly, the situation is very difficult and the severe drought has lead to a humanitarian crisis widespread throughout Somalia. The Court also refers to UNHCR's Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Somalia from 5 May 2010 which states that "*The generally deplorable living conditions of displaced persons in Puntland and Somaliland, however, indicate that an IFA/IRA is generally not available for individuals from southern and central Somalia in these territories*".

Already in 2009 there were reports on the increased refugee flows in Puntland and the difficult situation due to the drought. The Court considers that the deplorable and insecure situation for IDP's in Mudug and other areas in Somalia, even for those belonging to a majority clan, implies a risk of ending up i.e. in a refugee camp. Moreover, the catastrophic humanitarian situation worsened during 2011. Therefore, the Court considers that the situation for IDP's without families or other informal network hardly can be considered as being in line with UNHCR's guidelines on IFA from 2003. Nothing shows that the applicant would be in a position to, in one way or the other, support him self and obtain a better life than other IDP's in Puntland. There are considerable lacunas in this regard in UNE's decision from 12 March 2010 and, therefore, the decision must be overruled in regards to the protection assessment.