Neutral Citation Number: [2009] EWCA Civ 4

Case No: C5/2008/0759

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM ASYLUM AND IMMIGRATION TRIBUNAL
SENIOR IMMIGRATION JUDGE ALLEN
AA/06959/2007

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/01/2009

Before :

LORD JUSTICE LAWS
LORD JUSTICE RIX
and
LORD JUSTICE WILSON

- -

Between :

MA (SOMALIA)	**Appellant**
- and -	
SECRETARY OF STATE FOR HOME DEPARTMENT	**Respondent**

- -
- -

Mr Manjit Gill QC and Mr Abid Mahmood (instructed by **Messrs Blakemores**) for the **Appellant**
Mr Jonathan Auburn (instructed by **Treasury Solicitors**) for the **Respondant**

Hearing date : Thursday 16th October 2008

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Judgment

Lord Justice Rix :

1. The appellant MA is a young woman born on 24 June 1980 who claimed asylum in this country on 13 March 2007 at the Home Office in Liverpool. She has a small daughter born on 24 July 2005. She says that she arrived here on 13 March 2007, but that is in dispute. Her place of arrival is unknown. She claims to have flown here from Addis Ababa in Ethiopia but cannot say by what airline or to what airport. She claims to be of the Bajuni clan from the island of Koyama, which lies off the coast of Somalia, to have lived there all her life, and to be Somali. The Secretary of State refused her claim for asylum under the 1951 Refugee Convention and her claim for humanitarian protection under articles 2 and 3 of the European Convention on Human Rights (ECHR) and/or paragraph 339C of the Immigration Rules: on the grounds that it was not accepted that she was either a Bajuni or from Somalia. Those decisions were notified by letter dated 10 May 2007.

2. Pursuant to those decisions the Home Office issued dated 25 May 2007 two Notices of Immigration Decision. The first was headed "Refusal of Leave to Enter", referred to the rejection of her asylum and human rights claims, and said "I therefore refuse you leave to enter the United Kingdom". Rights of appeal were notified, inter alia on the ground that "your removal from the United Kingdom as a result of the decision would breach" the United Kingdom's obligations under the 1951 Refugee Convention or MA's rights under the ECHR. The second notice was headed "Decision to Remove an Illegal Entrant" etc and stated as follows: "You have made an asylum and/or human rights claim. The Secretary of State has decided to refuse your claim for asylum and/or human rights for the reasons stated in the attached letter" (presumably a reference to the letter dated 10 May 2007). This second notice also referred to her rights of appeal inter alia on the ground referred to above. At the end of the notice, against the rubric "Removal Directions", the following paragraph appeared:

> "If you do not appeal, or you appeal and the appeal is unsuccessful, you must leave the United Kingdom. If you do not leave voluntarily, directions will be given for your removal from the United Kingdom to Somalia."

3. MA did appeal, and it is assumed that she appealed all relevant decisions (the actual paper-work is not before us), but that is not clearly so. By an AIT decision dated 20 July 2007 IJ Parkes dismissed her appeal. He found that MA was of the Bajuni clan, but said –

> "Either the Appellant is a Kenyan Bajuni or she is a Somalian Bajuni from one of the islands who has lived for [m]any years in Kenya. I accept that the Appellant is a Bajuni but I do not accept that she is from Somalia…For the reasons given I do not accept that the Appellant is from Somalia."

On that basis, IJ Parkes dismissed both her asylum and her human rights (humanitarian protection) appeals. IJ Parkes plainly considered that the one fell with the other. Indeed he only mentioned the refusal notice dated 10 May 2007, and there is no sign that he was asked to consider any ramifications of the decisions dated 25 May 2007.

4. MA then sought and obtained reconsideration of the determination of IJ Parkes. The grounds in support of her reconsideration application raised the issue that as a lone female with a young child her article 3 (human rights) appeal ought to have been independently considered and allowed and did not flow from the rejection of her asylum appeal: since it was now accepted that she was from the minority clan Bajuni, she would be at risk on return to Somalia.

5. By a first stage reconsideration determination dated 29 January 2008 SIJ Allen upheld the determination of IJ Parkes as containing no error of law but reaching findings of fact to which he was entitled to come on the evidence before him. SIJ Allen concluded:

> "…he did not accept that the appellant is a Somalian Bajuni. As Mr Smart [the HOPO] pointed out, in the light of that finding, the fact that the Immigration Judge thought that the appellant is a Bajuni and most likely from Kenya, does not place her at risk on return to Somalia since the Secretary of State will have to rethink removal in the light of the Immigration Judge's conclusions."

It is not entirely clear how the argument proceeded before SIJ Allen with relation to the decision of 25 May 2007 to remove MA, nor exactly what kind, if any, of assurance was given on behalf of the Secretary of State about not returning her to Somalia, but at least SIJ Allen began with a reference to that decision in his first paragraph.

6. On this appeal, Mr Manjit Gill QC who appeared for the first time on behalf of MA, has taken two principal grounds (and has abandoned a third ground relating to burden of proof). The first ground is that IJ Parkes (and therefore SIJ Allen in turn) had erred in law in assessing MA's nationality in that he had given inadequate reasons and/or had come to an irrational conclusion. The second ground is that MA was entitled to a clear decision that return of her to Somalia would have been in breach of her human rights and that IJ Parkes and SIJ Allen ought not to have rested content with the knowledge that the Secretary of State would now have to think again about removing her to Somalia. The first ground is

relatively straightforward (and we did not need to call on Mr Jonathan Auburn who appeared for the Secretary of State); but the second ground raised intricate questions about the status under the Nationality, Immigration and Asylum Act 2002 of a decision to remove which proposed a return to a possibly unsafe country albeit not the country from which an appellant had come and not the country to which the Secretary of State now intended to remove the appellant in the light of the AIT appeal determination. This was despite the fact that it was common ground that the decision to remove did not amount to removal directions.

The facts relating to ground one and MA's nationality

7. MA's account of her life and her flight to this country was as follows. She was born in Koyama in Somalia in 1980 and was of the Bajuni minority clan. Her father was a fisherman. Her mother had disappeared when the 2004 Boxing Day tsunami reached Somalia. She accepted that she was uneducated and "have never attended a school". Ever since 1991, when civil war began in Somalia, the majority clan which she referred to as the Madarood (usually referred to as the Darood) had oppressed her family and her clan. In 1992 large numbers of her clan left Koyama for a United Nations displaced persons camp (in Kenya), but her family stayed behind because her mother was ill at the time. They would often be raided by Madarood soldiers. One day the soldiers torched their house and she suffered burns; and her father was taken away and only returned two weeks later on the verge of death (but he survived). Her father was forced to fish for the Madarood without payment. In 1998 the UN camp was closed and everybody returned, but this made things worse as they brought food and money with them and thus attracted more attention from the Madarood. In that year the Madarood came to their house again and raped her and her mother. She became pregnant but miscarried after three months. In 2002 the Madarood returned and stole her father's and brother's two boats. In 2004 they returned again and she was raped for the second time, and her brother died of his injuries. As a result of that second rape she gave birth to her daughter in 2005.

8. In 2006 things got still worse: the Madarood planned to set up camp in their area and so tried to drive the Bajuni out by looting and pillaging, raping women and kidnapping young boys to turn into soldiers. Her father said that "enough was enough" and that she needed to escape with her daughter. He was helped to contact an agent. He had to sell "another boat" to pay him, but she did not know how much he paid. All this took time. She left Koyama on 11 March 2007, first by boat for Kismayo on the mainland, and then by bus to Addis Ababa. She arrived with the agent by plane in the UK on 13 March 2007. She did not claim asylum at the airport because she was under the control of the agent, and she was put in a car and taken to Liverpool. Apparently she was in the car for more than 4 hours.

9. At her original screening interview she said that she was able to speak Kaswahili and Kabajuni, but not Somali, nor English which she said she neither spoke nor understood. The interview was conducted in Kabajuni, but at a certain point she was answering questions in English, and it was put to her that her English was quite good, and she was warned about answering in English. Unfortunately, we have not been provided with the record of her screening interview which was before both IJ Parkes and SIJ Allen. In her second witness statement she was to say that she was taught some English "when I was young" by her mother; and that the agent had also told her "quick words", such as when people ask "Are you OK?", to reply "Yes".

10. At her main Asylum Interview Record, which is in our bundle, the interpreter used mainly Kabajuni, but had also conversed with MA in Kaswahili. This took place on 2 May 2007, the day after her first witness statement is dated. In answer to a question as to how her father had raised the money for sending her to the UK if he had had to give away his fish without being paid for them, she said that he was only forced to do that once (when arrested) and that he had "two boats and sold them". She had previously referred in her witness statement to one boat. She was twice asked about Bajuni customs. Question 48 was: "Any customs and practices associated with the Bajuni clan?" She replied: "Yes there are, during weddings there's a town of Sorijo where we slaughter a cow at the same time we celebrate during the birthday of the prophet Mohammed". She was unable to explain the reference to Mohammed's birthday. Question 108 asked: "Are there any other daily practices that are specific to Bajuni clan?" She replied: "Maybe celebrations of when we swim in the sea at the beginning of the year. New year celebrations. Also during a wedding there are dances called the Durenge. There is a dance called the Chakacha. There is also another dance called Msando where we play with Machetes to show their strength." The reference to the Chakacha was held against her as it is a Kenyan dance. She was asked how many clan members there were overall in the Bajuni clan, and she said "3-4000 I think but I am not sure". That may on the objective evidence be an accurate statement. She was able to state the Bajuni sub-clans and other minority clans on Koyama. She could name the leaders of the Bajuni and some of the other minority clans.

11. IJ Parkes, who heard MA give evidence, rejected her claim to have been a Bajuni from Somalia rather than from Kenya on the grounds that her knowledge of English (and, but less importantly, her complete lack of knowledge of Somali) were against her, that while her knowledge of Bajuni customs was very limited she mentioned a characteristically Kenyan dance as being a native (Somali) Bajuni custom, that her account of her father's resources was inconsistent with his ability to finance her flight to the UK, and that her general credibility was also damaged by other considerations such as the circumstances in which she had come to this country and claimed asylum. In effect and in sum he found her not to be credible, save only that he accepted that she was a Bajuni.

12. IJ Parkes expressed these findings in the following passages:

> "10. On the subject of languages the Appellant speaks no Somalian. In the Danish and Dutch report of 2000 it was indicated that it would be expected that all Bajuni would know at least some Somalian. However in the Danish report of January 2004 that issue was treated in a less dogmatic fashion and it was stated that those from Kismayo would be more likely to speak it than those from the islands.
>
> 11. The fact that the Appellant is able to understand some English, even to the extent of being able to answer questions in it, is an odd feature. Her suggestion in giving evidence that she was taught some English by the Agent does not, in my view answer the question as to how she can do so.
>
> 12…It is impossible for the Appellant to have picked up [from the agent] more than one or two basic words of English and so her ability to speak it enough to answer any questions (and the fact that she answered questions is not disputed) has to indicate a far greater exposure than she has admitted.
>
> 13. On the Appellant's account she is uneducated and lived all her life on a small island off the coast of Somalia. There is nothing in the reports that I have mentioned that suggest that a person in that situation would be expected to know any English. A more likely explanation is that the Appellant has spent time in Kenya and mixed with English speakers.
>
> 14. The Kenyan connection is reinforced by the Appellant describing a Kenyan dance, the Chakacha, when giving details about Bajuni customs. The objective material does not bear out the Appellant's description of this dance as a Bajuni custom and I believe that she has encountered it in Kenya and not on the island of Koyoma. Other traits of Bajuni customs were not mentioned…
>
> 16. The objective material and both of the reports referred to make it clear that the Bajuni have suffered particularly badly over the years. Many have had to give up their traditional role of fishing with many homes being looted and fishing vessels being taken away. Some returnees have set up again but their circumstances are constrained and pay 50% of their revenue to the clans that occupy their land.
>
> 17. I do not believe that the Appellant's father would be able to raise sufficient funds to pay the Appellant's agent fees to bring her to the UK by the sale of two wooden boats. The Appellant's description of their circumstances in the island is at odds with the conditions described in the 2004 Report and further undermines the Appellant's credibility.
>
> 18…I note that the Appellant did not claim asylum at the airport and was driven a considerable distance to claim asylum. I believe that such a journey would have been undertaken to disguise the place that the Appellant flew from and make tracing her journey correspondingly difficult.

> 19. The evidence does not make a clear assessment of the Appellant's background easy. The fact that she was able to give geographical descriptions of the Bajuni areas and appears to speak a fair amount of Bajuni indicates that she is a Bajuni. Against the claim to be from Somalia is the fact that she speaks no Somalian (but living in an island this is less surprising), does speak some English and described a Kenyan dance as a Bajuni custom.
>
> 20. Either the Appellant is a Kenyan Bajuni or she is a Somalian Bajuni from one of the islands who has lived for [m]any years in Kenya. On the evidence available I accept that the Appellant is a Bajuni but I do not accept that she is from Somalia. Her lack of Somali is an indicator of that but more important is her ability to speak some English and her use of Kenyan customs in describing Bajuni culture. There were other significant cultural practices mentioned in the objective literature that the Appellant did not mention in any of the accounts she gave.
>
> 21. This is underlined by the fact that while she could give some geographical descriptions of the geography of the area in Somalia where the clan live her description of life there and her father's activities was inconsistent with the objective material and could not have been given by one who had lived there."

13. On reconsideration, SIJ Allen upheld these findings and could find no material error of law. He reasoned as follows. First, as to MA's use of English, he said

> "15…bearing in mind that the appellant said that she did not speak or understand English, and that English could not have expected to have been spoken on Koyoma, I consider that the Immigration Judge was entitled to have concerns about this factor. Clearly it could not be a determinative issue, but equally clearly it was a relevant matter to take into account."

As for the description of the Chakacha as a Bajuni custom, he said –

> "16…it is in fact, on the objective evidence, a Kenyan dance. It is also relevant to bear in mind, as the Immigration Judge did, that there were other significant cultural practices mentioned in the objective evidence that she did not refer to in any of the accounts that she gave. He rightly attached little weight to the fact that she does not speak Somali since the evidence shows that living on an island made this less surprising."

14. As for her account of how her father had managed to finance her escape by selling his fishing boat (or boats), SIJ Allen wrote as follows:

> "17. The Immigration Judge, at paragraph 16, noted the problems the Bajuni have experienced over the years, including that many have had to give up their traditional role of fishing, with many homes being looted and fishing vessels being taken away…[or] they paid half of their revenue to the clans who occupied their lands. It was with reference to this evidence that he went on to say that he did not believe that the appellant's father would be able to raise sufficient funds to pay for the agent's fees to bring her to the United Kingdom by the sale of two wooden boats. This, I read, as the reasoning behind his conclusion that the appellant's description of their circumstances on the island was at odds with the conditions described in the 2004 report and had further undermined her credibility…"

As for MA's account of coming to this country, he said:

> "18. He also went on to take into account the lack of credibility, as he saw it to be, of the appellant's claim not to have known what airline she travelled on or the details of the flight…"

15. SIJ Allen concluded as follows:

> "19. In my view the Immigration Judge came to conclusions which he was entitled to come to on the evidence before him. He did not attach excessive weight to the issue of the appellant's ability, as clearly was the case, to speak some English, bearing in mind on the one hand that no English is spoken on the islands or no evidence was given that English was spoken and that her exposure to the agent teaching her some English during a very limited period did not adequately explain that…"

16. On this appeal, Mr Gill sought to submit that IJ Parkes' determination was inadequately reasoned and irrational, and that SIJ Allen's acceptance of it as being free of error of law was equally flawed. In my judgment, however, these submissions lacked any weight and essentially were an attempt to reargue the facts. I bear fully it mind that the fact-finder must approach such asylum and human rights claims with anxious scrutiny, taking full account of differences in culture and avoiding scepticism based on a merely domestic perspective of what might seem improbable. I also understand that in this area of the law this court will want to see that such anxious scrutiny is sufficiently demonstrated by the reasoning of the tribunal. Nevertheless, it is well established that the complaints on which the first ground of this appeal is based, namely lack of adequate reasoning and irrationality, are closely circumscribed. Inadequate reasoning as a ground of appeal really requires this court to be able to say that it is impossible to

understand why the tribunal has reached its decision; and irrationality or perversity requires this court to be able to say that the decision is one to which no tribunal could sensibly come.

17. In this case, however, those tests are very far from being met. In invoking them, Mr Gill concentrated on two aspects of the AIT's findings and reasoning: first MA's use of English, and secondly, the criticism that MA lacked knowledge of Bajuni culture.

18. As for MA's use of English, Mr Gill submitted that the tribunal had paid insufficient attention to various possible bases suggested in the evidence for her ability to speak it. Thus he referred us to a passage in MA's first witness statement where she spoke of attending a religious school or madrassah, albeit solely in the context of an occasion when she was set upon in 1991 by Madarood soldiers on her way home and threatened with being burned alive if she returned to the madrassah. She said she was "very young" when this happened. In the light of her date of birth, she would have been about 10 years old. In her second witness statement she referred to a "religious group" rather than a school or madrassah. However, she never at any point ascribed her use of English to being taught it at religious school, and it might seem an unlikely place for learning it. She agreed in her second witness statement that she had "never attended a school whilst in Somalia". Next, Mr Gill referred us to another passage in her second witness statement where MA ascribed her English originally to her mother who had "taught my little English when I was young". However, it would appear from IJ Parkes' determination that in her oral evidence her use of English was confined to the teaching of the agent during her journey, and she made no mention of her mother. Thirdly, Mr Gill suggested that MA might have picked up her English from clan members who had returned in 1998 from the UN displacement camp in Kenya after it had been closed. However, MA never ascribed her English to this source. It cannot be right to speculate on such possibilities when MA has not herself ascribed to them her use of English. In my judgment, there is no lacuna of reasoning or finding in this aspect of the tribunal's determinations.

19. Mr Gill submitted that the AIT had placed excessive weight on this matter of English use. I do not consider that this is so. It was clearly a relevant and important factor, for both IJ Parkes and SIJ Allen, but each spoke of it in balanced and measured terms as one factor among others. Thus IJ Parkes said that it was "an odd feature" and "Against the claim", and as an "indicator" more important than the fact that she spoke no Somali. SIJ Allen said "Clearly it could not be a determinative issue, but equally clearly it was a relevant factor to take into account". Its weight was for the tribunal.

20. Under this heading of language, Mr Gill also complained about reference to MA's inability to speak any Somali. I do not think this submission was justified. IJ Parkes referred carefully to what various reports had to say about the speaking of Somali among the Bajuni. One report suggested that all Bajuni would speak some Somali, another that it was more prevalent among the Bajuni of the Somali mainland than on the islands. Mr Gill showed us one report which said that the island-based populations tended not to be able to speak Somali due to their "social isolation from the mainland". IJ Parkes said that her inability to speak Somali was "Against the claim…(but living on an island this is less surprising)". He also said that her lack of Somali was an indicator but that her use of English was "more important". SIJ Allen commented: "He rightly attached little weight to the fact that she does not speak Somali since the evidence showed that living on an island made this less surprising". In my judgment, it is clear that IJ Parkes attached some, but little real weight, to the lack of Somali. In *KS (Minority Clans – Bajuni – ability to speak Kibajuni) Somalia CG* [2004] UKIAT 00271 at paras 32 and 34 the objective evidence is described as follows: "It is reported [in a CIPU report] relying on information from Bajuni elders that most Bajuni also speak Somali…The information recorded [in the 2004 Danish, Finnish, Norwegian and British Fact Finding Mission to Nairobi] comes from Bakari Abdulla Bakari a representative of the Bajuni refugee community in Nairobi. He said that 50% of the Bajuni could speak Somali but the vast majority of these were from the mainland rather than the islands. The island based population tended not to speak Somali due to their social isolation from the mainland". Perhaps the objective evidence is equivocal. I find no error of law here.

21. Secondly, as to MA's knowledge of Bajuni culture and other aspects of IJ Parkes' assessment of her credibility, it was plainly highly relevant that she mentioned a dance, the Chakacha, which on the objective evidence was *characteristically* Kenyan rather than Bajuni or Somali, especially given the likelihood that she had learned her English in Kenya rather than from the agent as she claimed. This reference understandably severely undermined the very few other details of Bajuni culture on which MA relied. In this context Mr Gill suggested that when IJ Parkes said, at the end of his para 14, that "Other traits of Bajuni customs were not mentioned", he had overlooked the other matters (see above in answer to questions 48 and 108 of her interview) of which she had spoken. However, this is a most unlikely reading. IJ Parkes specifically referred to the Chakacha in the context of MA's "giving details about Bajuni customs". He could not have overlooked the answers. When he went on to say that "Other traits of Bajuni customs were not mentioned", he was clearly thinking of other customs which were established on the objective evidence. This is confirmed where IJ Parkes reverts to the matter of the Chakacha in his para 20 and says: "but more important is…her use of Kenyan customs in describing Bajuni culture. There are other significant cultural practices mentioned in the objective material that the appellant did not mention in any of the accounts that she gave". Mr Gill complained that these other matters were not expressly identified: but I do not consider that that is a valid complaint when it is not denied that such other significant cultural practices exist and we have not been given the objective material in our bundles. However, we have been provided with *KS (Minority Clans – Bajuni – ability to*

speak Kibajuni) Somalia CG [2004] UKIAT 00271 from which it is possible to see references to Bajuni culture and customs at paras 12ff. This certainly supports what IJ Parkes said.

22. Finally, Mr Gill submitted that IJ Parkes provided no content for his comment that MA's description of her and her father's life in Komaya "was inconsistent with the objective material". In my judgment, however, SIJ Allen was right when he explained this comment by saying that it was a reference to the difficulty in crediting that the father would be able to raise the money necessary for sending MA and the agent to the United Kingdom and paying the agent for his services out of the sale of two wooden (unpowered) boats, given the background of looting and impoverishment which prevailed in Komaya on the objective evidence (and on MA's own basic account). I would further remark that the tribunals postulated the sale of two boats, but MA's original witness statement spoke of only a single boat. The next day, when pressed in her interview on the subject of how her father raised the necessary money, she spoke of two boats.

23. For these reasons, I consider that there was no error of law in IJ Parkes' original determination, nor in the reconsideration determination of SIJ Allen, and I would therefore reject MA's first ground of appeal. I turn to her second ground.

Ground two: should the AIT have allowed MA's human rights appeal?

24. MA claimed that to return her to Somalia, as a lone woman accepted to be of the minority Bajuni clan with a young child, would have been in breach of at least article 3 of the ECHR. Mr Gill submitted that the AIT should have gone on to determine that claim independently of her asylum claim: even assuming that MA was a Bajuni from Kenya and not Somalia, it would have been contrary to her human rights to be returned to Somalia.

25. As I have indicated above, there is no sign in IJ Parkes' determination that any independent consideration was given to MA's human rights claim, which was considered to have failed together with her asylum claim. He simply concluded –

> "23. For the reasons given I do not accept that the Appellant is from Somalia. There is no evidence to support her claim to be in need of international protection on the basis of asylum o[r] Humanitarian Protection. There is nothing in the papers that raises a claim under the ECHR independently."

That last sentence may, perhaps, have been accurate at that time.

26. On reconsideration, however, it does appear to have been at least submitted that MA's human rights claim ought to be considered independently. SIJ Allen concluded, however (see under para 5 above) that she was not "at risk on return to Somalia since the Secretary of State will have to rethink removal in the light of the immigration Judge's conclusions."

27. The submissions under this second ground have now been developed by Mr Gill into a sophisticated case in reliance on or distinguishing previous jurisprudence: to the effect that MA was entitled to have her human rights appeal independently adjudicated, and that as such her appeal ought to have succeeded before the AIT, so that (presumably, but there was some lack of clarity here) all the various decisions of the Secretary of State ought to have been quashed, or at least the decision to remove ought to have been quashed; that it was unsatisfactory for MA to be left merely to rely on the "rethinking" of the Secretary of State; that there was a danger that any future removal directions would not amount to a new "immigration decision" for the purposes of enabling a further appeal under section 82 of the Nationality, Immigration and Asylum Act 2002 (the "2002 Act") so that MA might in future be left to the mere possibility of a claim in judicial review; and that in any event in the meantime while the Secretary of State made up her mind it was unfair for MA to be left here in a form of "limbo", at risk of being forced into a status both of deprivation and of breach of the criminal law.

28. As for the position of a lone Bajuni woman returned to Somalia, Mr Gill, while accepting that the matter would have to be remitted to the AIT, could point to decisions such as *KS (Somalia CG)* and *NM and others (Lone women – Ashraf) Somalia CG* [2005] UKIAT 00076 to the effect that lone women of a minority clan would be at risk. I am prepared to assume that that is so, or at any rate strongly arguably so.

29. The Secretary of State's case, in the submissions of Mr Auburn, is simpler. It is essentially that a decision to remove is not the same as removal directions; that for the purpose of a decision to remove a proposed country of return is mentioned in the decision notice so as to facilitate an appeal by the applicant for asylum, but it is not part of the decision itself; in the present case, as in other cases where the national origins of the applicant are disputed, the Secretary of State tends to take the applicant's country of origin and return at face value, even though disputed in the proceedings, so that if the applicant fails to make good his or her case the proposed country of return drops away, leaving the Secretary of State to rethink the matter of future removal directions; and that in this case, in the light of the AIT's findings the Secretary of State can and does assure the court that there is no

intention to remove MA to Somalia. In the circumstances, the question of her safety in Somalia is entirely moot, and IJ Parkes and SIJ Allen were entitled and correct to dismiss her appeal.

30. These submissions need to be understood in the light of some jurisprudence relating both to the 2002 Act and to its predecessor, the Immigration and Asylum Act 1999 (the "1999 Act").

31. I start with *Regina (Kariharan) v. Secretary of State for the Home Department* [2002] EWCA Civ 1102, [2003] QB 933 ("*Kariharan*"). The issue there arose out of the fact that the applicant's substantive asylum appeal rights had been exhausted before the 1999 Act came into effect, but removal directions had been given after that date. The question was whether section 65(1) of the 1999 Act gave a right of appeal on human rights grounds in relation to the removal directions in such circumstances. This court held that it did, since section 65(1) gave a right of appeal from removal directions whether free-standing or consequent on some earlier refusal of leave. Section 65(1) was in broad terms:

> "A person who alleges that an authority has, in taking any decision under the Immigration Acts relating to that person's entitlement to enter or remain in the United Kingdom, acted in breach of his human rights may appeal to an adjudicator against that decision…"

This court gave to the language "any decision…relating to that person's entitlement to enter or remain" a broad interpretation, rather than the narrower interpretation espoused by the Secretary of State.

32. It was in the course of his judgment in that case that Sedley LJ made certain comments which Mr Gill relies on here, thus –

> "38. The Secretary of State seeks to meet this [the argument that the narrower interpretation would create a jejune right of appeal] by reminding us that in practice, wherever he considers it merited, he will generate a right of appeal under section 65(1) by issuing a fresh decision on the applicant's immigration status. This in my judgment does not make things better: it makes them worse. As Lord Shaw of Dumferline in *Scott v. Scott* [1913] AC 417, 477 classically pointed out, "To remit the maintenance of constitutional rights to the region of judicial discretion is to shift the foundations of freedom from the rock to the sand." Much the same is true of administrative discretion. The difference is, of course, that administrative discretion is subject to control by judicial review. But this only increases the anomaly inherent in the Home

> Secretary's case. He accepts that, if his reading is adopted, judicial review of a decision to remove will lie on human rights grounds against both the Secretary of State and the immigration officer by virtue of sections 6 and 7 of the Human Rights Act 1998. What possible legislative policy could this represent? The one-stop policy?"

Sedley LJ went on (in para 39) to give a graphic example of the much greater security which a simple and unilaterally invoked right of appeal from removal directions gave to a party on the eve of removal in the light of some last-minute danger.

33. The problem of the asylum applicant whose origins were disputed next arose under the 1999 Act in *MY (Disputed Somali nationality) Somalia** [2004] UKIAT 00174 which became known in this court on appeal as *Yusuf v. Secretary of State for the Home Department* [2005] EWCA Civ 1554. In that case the appellant claimed asylum on the basis that he was a Somali national of the Bajuni clan. The Secretary of State refused his application, on the ground that he was not a Somali. In the refusal letter the Secretary of State said:

> "Directions will be given for your removal to Somalia as this is the country of which you claim to be a national. This has been done solely in order to enable you to appeal to an Adjudicator…If you appeal…and the Special Adjudicator also concludes that you are not Somali, we will seek to establish your true nationality."

Subsequently a "Notice of refusal of leave to enter after refusal of asylum" contained the following paragraph:

> "<u>REMOVAL DIRECTIONS</u>
> I have given/propose to give directions for your removal by a scheduled service at a time and date to be notified to (Country/Territory) SOMALIA."

The adjudicator found that the appellant was not a Somali and therefore rejected both his asylum and human rights appeals, but continued:

> "That is not to say that I believe the appellant should be returned to Somalia. Such a course would be quite wrong as he is not a national of that country, the more so bearing in mind the evidence relating to the conditions there."

34. Mr Gill, appearing in that case for the appellant Yusuf, submitted to the IAT that his appeal should therefore be allowed, seeing that the Secretary of State could not lawfully give removal directions for Somalia under paragraph 8(1)(c) of Schedule 2 to the Immigration Act 1971. The IAT rejected that submission on the ground that removal directions under Schedule 2 had not yet been given. As for his human rights appeal, the possibility of breach did not arise since the Secretary of State had made it plain in the refusal letter that the question of where he would be returned would be reconsidered once his true nationality had been established.

35. This court agreed with that analysis. Latham LJ said:

> "20…Although the notice made specific reference to "Removal Directions", it did so ambiguously, in that the two alternatives, namely "I have given/propose to give directions…" remained unresolved. But taken together with the letter it seems to me to be clear that the Secretary of State was not intending to give directions at that stage, but was intending to revisit the matter in the light of the results of any appeal. This is consistent with the fact that the right of appeal was identified in the notice as a right under Section 69(1) of the 1999 Act, namely an appeal against the decision to refuse the appellant leave to enter…"

Latham LJ went on in para 21 to accept that section 65(1) gave a right of appeal against removal directions as such ("even though not expressly, because such directions clearly relate to the right of the would-be immigrant to remain"). But that was not as yet in issue. He continued –

> "22. In one sense that resolves the appeal…As the Tribunal held, the clear statement of intent by the respondent to reconsider the matter in the light of any findings made on the appellant's appeal, meant that no question arose, or arises now, as to whether any decision has been made which is capable of affecting his human rights so as to entitle him to appeal under section 65(1) of the 1999 Act."

36. Having said that he was uneasy about a further suggestion of the IAT that it would be an abuse of process for Yusuf to say that he would be ill-treated (if returned to Somalia) as a non-Somali, Latham LJ returned to the point of decision in that case at para 26:

> "The fact that his claim to be a Somali was rejected was in itself sufficient to determine the issues in this appeal…the appellant had simply failed to establish his status as a refugee…which prevented him on the facts of this case, and in the absence of directions that he be removed to Somalia which

could have been the subject of an appeal under section 65(1) of the 1999 Act, from establishing any case under the European Convention…The issue might have to be revisited in relation to any appeal or other challenge to removal directions once given. But for my part I do not consider that it would be right to pre-empt that issue."

Pill and Arden LJJ agreed with Latham LJ.

37. The next case I refer to, *KF (Removal directions and statelessness) Iran* [2005] UKIAT 00109 was decided under the 2002 Act and concerned a Kurd who had been born in Iran in 1972, captured with the rest of his family by invading Iraqi forces and taken to Iraq in 1976, and now, following the fall of Saddam Hussein, claimed asylum in the United Kingdom on the basis that he feared persecution as a Kurd in Iraq. There was no dispute about his birth in Iran or his being taken to Iraq, but events such as these caused disputed nationality issues between the two countries. KF said he was no longer a citizen of Iran and objected to his removal there. He appealed against a notice of decision which against the rubric "Removal Directions" stated "Directions will be given for your removal from the United Kingdom to Iran".

38. The IAT decision was given by its President, Ouseley J. He rejected the notion that these were removal directions at all: the paragraph in the notice was "simply the statement of the country of proposed removal required by the Notice Regulations" (at para 52; see regulation 5(1)(b) of the Immigration (Notices) Regulations 2003 which requires the notice to "state the country or territory to which it is proposed to remove the person"). That much is common ground in the present appeal, where a similar paragraph appears in the notice of decision to remove, but referring to Somalia.

39. In *KF* however the adjudicator had allowed the applicant's appeal on the sole ground that these were removal directions which were "not in accordance with law" because they did not come within any of the provisions of Schedule 2 to the 1971 Immigration Act. Otherwise, the adjudicator would have rejected the asylum appeal. The Secretary of State appealed to the IAT, successfully, so that the applicant's appeal was remitted to an adjudicator to consider (as I understand it) whether return of KF to Iran would have breached either the refugee or human rights conventions.

40. Along the way, Ouseley J held that the requirements of Schedule 2 were not relevant to the appeal (para 64) and that the question of any return to Iraq was also

irrelevant, since it had not been specified in the notice (paras 70 to 76). The questions which the tribunal considered, drafted of its own motion to assist the analysis, are set out at para 36.

41. Mr Gill relies on this IAT decision, however, as indicating that under the 2002 Act, as distinct from the 1999 Act, a decision on the question of breach of either convention in relation to return to the proposed country of return was absolutely necessary. He refers in particular to the following passages:

> "63. The country specified in the Notice is not material for the determination of whether or not the Claimant is a refugee…If a claimant cannot establish that he is a refugee, that question [under Articles 32 or 33 of the Refugee Convention] does not arise; *MY (Somalia)**.
>
> 64. The country specified is obviously critical to the ground of appeal, consequent upon removability being established, that removal would breach either Convention. It is the country of removal which is capable of giving rise to the breach rather than removal in the abstract. The purpose of the specification of the country is to focus on the consequences of removal…
>
> 65. If removal to the country specified would involve a breach of either Convention, the appeal would be allowed. It could not be dismissed on the basis that removal would be unlawful to that country because of the 1971 Act, would not therefore take place and so there would be no risk. Circumstances change any way. If the Secretary of State were to decide that he could remove the Claimant to another country, he would have to issue a fresh and appealable decision. Following the allowing of the appeal against his first decision…
>
> 68. The statutory structure is intended to give a full factual merits appeal in relation to risk on return to the country proposed for removal. It is not intended to give an appeal in relation to the first country proposed and to provide for a review challenge only in relation to any subsequently proposed…
>
> 69. We prefer this analysis to the possible alternative canvassed in paragraph 53 of *MY (Somalia)** to the effect that fresh removal directions for a different country might not give rise to a fresh appeal but would lead only to Judicial Review."

42. In my judgment, however, this is not as useful to Mr Gill as he would submit. In the first place, the IAT decision in *KF* precedes this court's decision in *Yusuf* (*MY (Somalia)** on appeal). Secondly, the problem in *KF* was a different one, for there the IAT had made no decision on the substantive appeal at all, having been wrongly diverted from it by thinking that it was dealing with removal directions as

such and by considering that Schedule 2 to the 1971 Act was relevant. No part of schedule 2 is relevant in the present case. Thirdly, the Secretary of State was not willing to abandon his proposal to remove KF to Iran: therefore the actual point of decision in *Yusuf* or in the present case did not arise.

43. Perhaps closer, however, to that last point (being the one that arises in the present case, albeit not against the background of the *MY (Somalia)*/Yusuf* style of refusal letter with its express recognition of more than one possibility in terms of subsequent removal directions) is the following passage from later in the *KF* determination:

> "78. The remaining possibility is that the Notice of Decision should refer to countries in the alternative, perhaps with the reason why set out in the accompanying letter. In this case the Notice might have said that the Secretary of State intended to return the Claimant to Iran but if that were to involve the breach of either Convention, he intended to return him to Iraq. The appeal could then be allowed if neither country were acceptable because of the Conventions and dismissed if either was. The decision would make clear whether removal to one country alone would involve no breach of Convention rights.
>
> 79. Again this course has something to commend it in practical terms; but we do not regard it as the correct solution without much further consideration. The appeal determination has to be clear as to its consequences. Even if there were no difficulty in saying that the appeal was dismissed because removal in consequence of the Secretary of State's decision would be to the safe country rather than to the unsafe one, the Notice of Decision would have to be read with that determination in order for its consequences to be understood. We think that the Secretary of State Decision Notice should be clear as to its consequence when enforcement comes, it should be understood simply with the knowledge that the appeal against it has been allowed or dismissed and should not require the determination of the appeal body to be with it or understood properly before the consequences for the Claimant are clear. We think that the statutory framework reflects our provisional view on this.
>
> 80. It follows from what we have said that the Notice of Decision should refer only to one country. If the appeal is allowed but the Secretary of State thinks that removal to another country would be within the Conventions, he can take a fresh appealable decision. If the appeal is dismissed and the country of the proposed removal falls outside the Schedules and removal cannot therefore take place, the Secretary of State cannot issue removal directions for another country without necessarily generating a fresh appealable immigration decision.
>
> 81. Here, Iraq does not fall for consideration upon the remittal for reconsideration…

> 82. This is different from the position in *MY (Somalia)**, where the Notice and accompanying letter were seen as containing a two stage decision that removal should be to Somalia, but not if he were not a Somali national; see paragraphs 47 to 52.
>
> 83. We are not intending to preclude more than one country being referred to, were that necessary, in those circumstances where return is via a transit country where that country nevertheless has to be entered. That sequence gives rise to different problems from the question of alternative or contingent countries of proposed removal."

44. That passage was not relied on by Mr Gill. It indicates that the *MY (Somalia)*/Yusuf* style decision letter/notice would not fall foul of the IAT's provisional view that alternative removal directions should not be specified (save possibly in transit situations). Presumably the *Yusuf* type approach is referred to as proposing a "contingent" destination rather than alternative destinations. In my judgment this passage is not of assistance to Mr Gill, for it appears to contemplate that the *MY (Somalia)*/Yusuf* result could be achieved even under the 2002 Act. There is no suggestion that the 2002 Act regime differs for these purposes from the 1999 Act so as to require a different solution not available in *MY (Somalia)*/Yusuf.*

45. We were also referred to *GH v. Secretary of State for the Home Department* [2005] EWCA Civ 1182, [2006] INLR 26. That concerned a Kurd from Iraq who had lived in the Kurdish Autonomous Area ("KAA"). He claimed asylum in the United Kingdom on the ground that the KAA was unsafe for him because of the risk of persecution at the hands of both Islamic groups and a rival secular Kurdish group. In 2003, following the end of Saddam Hussein's regime in Iraq, the Secretary of State decided that it was safe for GH to return to the KAA. On his appeal from that decision, the issue arose as to whether a particular route for his return to the KAA (viz via Baghdad) raised a risk which might breach either the refugee or human rights conventions. This issue resolved itself into a question of the width of section 84(1)(g) of the 2002 Act which allows a right of appeal on the ground:

> "(g) that the removal of the appellant from the United Kingdom in consequence of the immigration decision would breach the United Kingdom's obligations under the Refugee Convention or would be unlawful under section 6 of the Human Rights Act as being incompatible with the appellant's Convention rights."

46. The case for the Secretary of State was that section 84(1)(g) should be given a narrow construction as being concerned solely with the question of removal in

principle and not with the route of return or travel arrangements whether they have been identified or not. The case for the appellant GH however was that section 84(1)(g) should be read more broadly so as to encompass particular route or travel arrangements: method of return was an integral part of removal. This court held that GH's appeal failed, albeit it adopted an analysis which lay somewhat between the competing submissions. The critical factor however was that removal directions *per se* were not, under the 2002 Act, an appealable immigration decision. *GH* therefore confirmed at court of appeal level what the IAT (Ouseley J) in *KF* had also decided. Lord Justice Scott Baker said –

> "39. In my judgment *Kariharan* has to be read as a decision on the true construction of section 65(1) of the 1999 Act. The difference between section 65(1) of the 1999 Act and section 82(1) of the 2002 Act is that an 'immigration decision', that is the decision giving a right to appeal, is defined in section 82(2) as covering some 12 different types of decision not one of which is removal directions. Section 65(1) is dealing with a very specific situation.
>
> 40. For Mr Cox to succeed he has to persuade the court that the argument in *Kariharan* has survived the change in the legislation and the fact that removal directions are not listed in section 82(2). In my judgment he has failed to do so. Indeed it was suggested that the change in the law removing 'removal directions' from within the definition of 'immigration decision' may well have been precipitated by *Kariharan*…
>
> 45. In my judgment the fact that the 2002 Act does not include 'removal directions' within the description of 'immigration decision' against which there is a right of appeal is determinative of Parliament's wish that there should be no free-standing right of appeal against removal directions. This seems to me to be entirely consistent with the desire to streamline the appellate process in immigration and asylum cases and prevent repeat applications. That, however, leaves open the question of jurisdiction in cases where removal directions are given as part of, or are entirely incidental to, an immigration decision that is itself appealed as falling within section 84(1)(g). Also there may be circumstances where the Secretary of State adopts a routine procedure for removal and return so that the method or route of return is implicit within the decision to remove. There would obviously be advantages in such cases for all issues, including any arising out of the proposed route or method of removal, to be dealt with at one and the same time.
>
> 46. In my view the appellate tribunal's jurisdiction attaches to an immigration decision as defined in section 82(2) of the 2002 Act. In order to found an appeal an appellant would have to challenge one or more of the decisions specified in subsection (a) to (k). If the Secretary of State chose to give removal directions at the same time as and linked to, for example the refusal of leave to enter the United Kingdom (which is not, as I understand it his ordinary practice at the present time) then it seems to me that commonsense dictates that both should be considered at the one appeal. That would be entirely in keeping with the policy of the legislation. It also accords with the

approach of the Court in *Kariharan*. Furthermore, I regard the wording of section 84(1)(g) as wide enough to permit this.

47. What I do not think the present legislation permits is an appeal against entirely freestanding removal directions as would be the case when they are made separately on a later occasion. In such circumstances the remedy for unlawful directions would be judicial review. It is, however, unnecessary for present purposes to decide the extent of the tribunal's jurisdiction in circumstances where removal directions are given at one and the same time as an appealable immigration decision or where there is an established route of return which it is known will be used.

48. The present appeal in my judgment fails because no removal directions have been set. The question whether, when they are, there could be a breach of the United Kingdom's international obligations is wholly academic. What directions the Secretary of State eventually decides to give, if any, are a matter for him. If when he gives directions it is contended that they are unlawful because they breach the United Kingdom's international obligations the remedy would be judicial review. There is no right of appeal under the 2002 Act."

47. The last authority to which we were referred for these purposes was *JM v. Secretary of State for the Home Department* [2006] EWCA Civ 1402. JM had come to this country as a visitor from Liberia, where his daughter and her daughter, his grandchild, lived. He claimed asylum here on the ground of the dangerous political situation in Liberia. He also relied on family life (article 8 of the ECHR) in the United Kingdom. A preliminary point arose as to whether, in the absence of removal directions, where the only decision appealed against was a refusal to vary JM's leave, which of itself did not entail any removal, the human rights claim did not (as yet) arise for decision: the article 8 point was simply being marked up to protect JM's interests for the future. The AIT on reconsideration decided that in such circumstances the human rights claim was not justiciable. On appeal to this court, both parties agreed that the AIT was wrong not to have determined the human rights claim and both parties asked for the appeal to be allowed on that point. In those circumstances this court asked for the assistance of an amicus curiae. The issue became whether the immigration decision in question could be brought within the language of section 84(1)(g) on the basis that its wording "removal…in consequence of the immigration decision" applied. This court decided that it could. Among the reasoning which led to that result was the following passage in Waller LJ's judgment, upon which Mr Gill relied:

"17. There is, as it seems to me, a consideration of public policy which illuminates the construction of the subsection. As the Secretary of State submits by Miss Grey of counsel, once a person's appeal against a refusal to vary his leave is dismissed, he must leave the United Kingdom. If he does not, he commits a criminal offence (Immigration Act 1971, section 24(1)(b); the 2002 Act, section 11). His entitlement to state benefit is also affected. If

> another employs him, that other is guilty of a crime (Asylum and Immigration Act 1996, section 8). On the AIT's view of the question, namely that the human rights issue is not justiciable on a variation of leave appeal, the unsuccessful appellant in such a case, if he has a potential article 8 claim which would so to speak come alive on his removal, surely faces a very unsatisfactory choice. Either he leaves the United Kingdom, as the criminal law says he must, or he remains until removal directions are given, anticipating that at that stage he will be able to ventilate his human rights claim before the AIT.
>
> 18. It seems to me to be wrong in principle that the price of getting before an independent tribunal, for a judicial decision on a human rights claim should be the commission of a criminal offence and other associated legal prohibitions."

48. Mr Gill submitted that a similar "limbo" would apply to MA in this case if the result of her appeal were that it was dismissed while she awaited an indeterminate time for the Secretary of State to "rethink" her position. The right and proper solution was to say that her return to Somalia would be in breach of article 3 ECHR and that therefore her appeal against the decision to remove her should be allowed. Mr Auburn submitted, however, that what the Secretary of State did in such circumstances was to regularise the applicant's position in the meantime by a grant of temporary admission

49. In my judgment these authorities lead to the following conclusions relating to the present appeal. (i) The notices of decision in this case do not include removal directions. (ii) The notice of decision to remove (which I assume is among the matters appealed from) is an immigration decision giving a right of appeal under section 84(1)(g) but does not contain, either expressly or inherently, any removal directions. (iii) The reference to removal directions towards the end of that notice is only an indication of a "proposed" country of removal pursuant to regulation 5(1)(b) of the 2003 Regulations. (iv) Thus the proposal to remove MA to Somalia was a proposal not a decision. The decision was to remove, and the proposal was to remove to Somalia. The purpose of the requirement of the Regulations that the country to which it is proposed to return an applicant should be stated in the notice of decision to remove is no doubt, as Mr Auburn submitted, to enable the applicant to test the validity of the proposal for the purposes of the applicant's appeal under either convention.

50. (v) A particular problem arises for the Secretary of State (and for the applicant) in cases where there is a dispute about origins or nationality which might affect not only of course the merits of the applicant's case but also the question of which country any return would be to. It is not known why the Secretary of State no longer gives an indication of the contingent nature of his or her proposed country

of return, as occurred in the *Yusuf* letter (but not in the *Yusuf* notice of decision). We asked Mr Auburn that question, but he was not able to give a reason. However, there is nothing in the jurisprudence to suggest that a contingent proposal could not be stated in the notice of decision to remove (that would appear to be the right place for it) and Ouseley J in *KF* seems expressly to have accepted that such a contingent proposal would be satisfactory, as used in *MY (Somalia)*/*(*Yusuf*), despite his provisional view that alternative proposed countries of return should not be stated. (As it happens, the 2003 regulations were subsequently amended by the Immigration Notices (Amendment) Regulations 2006 so as to permit the stating of alternative proposed countries of return in one decision notice). In my judgment, where the Secretary of State proposes a destination in which she does not believe (because it represents the applicant's and not the Department's case), it would be better to state the matter contingently, as in *MY Somalia*/ Yusuf*. That would also be more transparent, even though I see that a proposed destination is not necessarily the same as an intended destination. In my judgment, such a notice would be consistent with the Regulations.

51. (vi) Since the country of return specified in the notice of decision to return is only a proposal, there appears to be nothing to prevent the Secretary of State stating that, in the light of the factual findings made by the tribunal, he or she no longer intends to remove the applicant to that country. Admittedly, where this is said in the course of an applicant's appeal rather than in the notice of decision itself, that is somewhat different from the gloss that was put upon the Secretary of State's notice of decision to remove in *Yusuf* where Latham LJ was able to say that "no question arose, or arises now, as to whether any decision has been made which is capable of affecting his human rights". However, as long as the matter is addressed with the required degree of formality and is recorded in the order made by tribunal or court, I see no reason why an issue which was only ever raised as a matter of a proposal and has become academic in the light of findings made, needs to be addressed on entirely academic assumptions. The positions in *Yusuf* and here are essentially similar. The only reason why the Secretary of State here proposed Somalia, when it was obvious from the reasons for refusal letter that MA's case that she was a Bajuni and from Somalia was rejected by the Secretary of State, was because that was MA's case, which needed to be tested, and because the Secretary of State could not be sure where MA was from.

52. (vii) As Mr Gill has pointed out and relied upon, section 86 of the 2002 Act provides as follows:

> "(1) This section applies on an appeal under section 82(1)…
>
> (2) The Tribunal must determine –
>
> (a) any matter raised as a ground of appeal (whether or not by virtue of section 85(1)), and
>
> (b) any matter which section 85(1) requires it to consider.

(3) The Tribunal must allow the appeal in so far as it thinks that –

(a) a decision against which the appeal is brought or is treated as being brought was not in accordance with the law (including immigration rules)…"

He therefore submitted that the human rights issue of a return to Somalia *must* be determined and the appeal allowed (and the decision quashed) if the decision was not in accordance with law because of breach of MA's human rights on return to Somalia. In my judgment, however, such statutory language does not force the tribunal to render an academic decision on a matter which has become moot. If in such circumstances (and assuming in MA's favour that her return to Somalia would be a breach of at least article 3) the court has to decide whether the decision to remove is lawful or not, when the Secretary of State formally states that she does not intend to remove MA to Somalia and the consequences of such a proposal become academic and moot, it seems to me that it must be right to uphold the decision to remove and leave for the future any new question of removal to a different destination for the time when it occurs and in the light of circumstances then prevailing: at any rate provided there are sufficient safeguards for the applicant in the meantime. The alternative of proceeding to address a moot issue and, if that issue is decided in the applicant's favour, of allowing the appeal and quashing the decision to remove would seem to me to be unrealistic: when the fact is that the applicant has no right to remain.

53. (viii) I address the matter of sufficient formality regarding the matter of removal to Somalia, because I agree with what Ouseley said in *KF* at para 79. If MA's appeal is to be dismissed on the basis of the Secretary of State's assurance, which I regard as being in the nature of an undertaking or what in the United States is called a stipulation, then that should be recorded in the tribunal's or court's order. There can then be no doubt, on the face of the order, of the basis on which it was made. It amounts to a withdrawal of the proposed removal to Somalia. It seems to me that good sense must allow the statute to permit such a withdrawal in the circumstances of disputed origins as found in this case.

54. (ix) What then is to happen if and when, after her rethink, the Secretary of State makes a further proposal for removal or perhaps proceeds directly to removal directions? I assume for these purposes that, since entirely free-standing removal directions are not an immigration decision under the 2002 Act, therefore, as was provisionally decided in *GH*, such removal directions can only be attacked by judicial review and not by statutory appeal. That, however, was where a proposed destination had been adjudicated and only route or method were in issue. Even so, I am inclined to think, although it does not have to be here decided and it has not been really addressed in argument, that, where an entirely new destination is proposed, Ouseley J's solution in *KF* may be right and that in such circumstances there is a fresh immigration decision giving a new right of appeal. The issue of a

decision to remove on the basis of a proposed removal to some new country will never have been determined.

55. (x) As for Mr Gill's "limbo" argument, I would observe: (a) that on the basis that MA comes from Kenya and would be able to return there, she would be able to leave voluntarily and on that basis run no risk of being put into criminal or welfare difficulties here; (b) that her situation arises out of her own false claim to Somali nationality; (c) that the Secretary of State is able to deal with this difficulty in the way Mr Auburn suggested is her practice, namely by granting MA temporary admission.

Conclusion

56. In sum, in my judgment SIJ Allen was right to say that, in the light of the tribunal's finding about MA's origins, now confirmed by the Secretary of State's undertaking or stipulation that she has no intention of returning MA to Somalia, the Secretary of State's decisions that MA has no right to enter and should be removed must stand, and MA's human rights appeal, as well as her asylum appeal, were rightly dismissed. It follows that her appeal to this court must be dismissed in turn.

57. **Lord Justice Wilson :**

I agree.

58. **Lord Justice Laws :**

I also agree.