EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

Lord Carloway
Lord Hardie
Lord Philip

[2009] CSIH 78
XA76/08

OPINION OF THE COURT

delivered by LORD CARLOWAY

in the application for leave to appeal

by

AA (A.P.)

Applicant;

against

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent:

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Act : Caskie; Drummond Miller LLP (for Ethnic Minority Law Centre, Glasgow)

Alt: Lindsay; Solicitor to the Advocate General

13 October 2009

1. Background

[1] The applicant claims to be a national of Somalia. She maintains that she was born and brought up on Koyama Island, south of the port of Kismayo on the east coast. She

says that she is of Bajuni ethnicity and, as such, is persecuted by the majority clans in Somalia, notably the Darood and Hawiye. She says that she lived all her life on Koyama other than from 1991 to 1997, when she was in a refugee camp near Mombassa, Kenya. When she claimed asylum on 1 April 2007, she gave an account of police attacking her family home on 20 October 2006, raping her and killing her mother and sister. She was left pregnant by the rape and now has an infant, born in the United Kingdom. She managed to reach the UK by sailing to Kismayo on 30 March 2007, flying to Mogadishu and, from there, to the UK via an unknown country.

[2] It is not disputed that the Bajuni are persecuted by the majority clans in Somalia. The majority clans, who make up almost 80% of the population, are able to protect their own kin by use of their militia. The Bajuni are a minority clan. They live generally in fishing communities on the coastal areas of Somalia south of Kismayo, including the offshore islands such as Koyama, and north east Kenya. They are not able to provide protection by the use of militia and are subject to significant persecution. Given the lawless state of South Central Somalia, a Somalian Bajuni will normally qualify for protective status under the Refugee Convention.

2. The Immigration Judge's Determination

[3] The applicant's claim for asylum was refused by the respondent by letter dated 24 April 2007. When her appeal came before an Immigration Judge on 6 July 2007, the respondent submitted (para 15) that the crux of the claim was whether the applicant was of Bajuni ethnicity. That submission is well founded if an assumption is made that the applicant is from Somalia. It is a important element in this appeal that the IJ was "prepared to accept" that the applicant was "from Somalia" (para 60). However, he rejected her contention that she was from Koyama or of Bajuni ethnicity.

On that basis, he dismissed her appeal. It is important to record that, in reaching his conclusions, the IJ specifically stated that he was attempting to follow the Country Guidance case of *AJH (Minority Group-Swahili Speakers) Somalia CG* [2003] UKIAT 00094 which reiterated (see para 33):

> "57. ...What is needed...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:
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> a) knowledge of Kibajuni;
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> b) knowledge of Somali varying depending on the person's personal history; and
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> c) knowledge of matters to do with life in Somalia for Bajuin (geography, customs, occupations etc.)
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> But what is also needed is (2) an assessment which does not treat any one of these three factors as decisive: ...it is even possible albeit unusual that a person who does not speak Kibajuni or Somali could still be a Bajuni".

[4] There is little doubt that there was ample material before the IJ to justify his conclusion that the applicant was not from Koyama; i.e. that her case under heading "c)" (*supra*) was a weak one. This material (paras 52 *et seq*) included an answer, which she gave at interview, as to which was the largest island of the group that she came from. She answered "Kismayo", and also referred to it as an island on another occasion. Kismayo is neither an island nor on an island, being a port on the mainland Somalia coast. This counted heavily against the applicant. She also stated that it was not possible to see either the mainland or other islands from Koyama. This was also wrong. The IJ considered that the applicant's view, that it would take five hours to go from Koyama to Kismayo by boat, was also erroneous, although this may be doubtful. There were other matters which suggested that the applicant was not from Koyama including a lack of knowledge of the basic geography of Koyama island itself, notably its general shape and dimensions. Finally, she appeared unaware of the problem of forced labour, which is a major problem for Bajuni on Koyama and other islands.

Thus, it is not at all surprising that the IJ reached the conclusion he did on this aspect of the claim.

[5] However, the language issue posed different problems. In relation to aspect "a)" in *AJH etc* (*supra*), the IJ made certain general findings:

> "33. ...The principal language [of the Bajuni] is Kibajuni, a dialect of Swahili. ...most Kibajuni (*sic*) also speak Somali...
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> 35. ...the Bajuni in Kismayo and outlying islands speak their own dialect. It was estimated that 50% of those are able to speak Somali but... the vast majority of those that can understand Somali are from the mainland. It was highlighted that the island based population has tended not to be able to speak Somali because of their social isolation from the mainland".

*Quantum vale*at, the AIT in *AJH etc* (*supra*) also found (paras 30 and 56) that most, but not all, Bajuni speak Somali. But, at least in the version of the Determination and Reasons provided to the Court, they went on (para 56) to make a particular note of the evidence of a Professor Lewis that "Most Bajuni do *not* (emphasis added) speak Somali...The kind of Bajuni who would [speak Kibajuni] (*sic*, ?[speak Somali]) are those who have most interaction with Somalis, minor local political or business role or elders, leaders of local communities" (see also para 12).

[6] Although the applicant had originally said at interview that "she spoke mainly Swahili but a little Kibajuni" (para 46), it transpired, by the time of the hearing of the appeal before the IJ, that she spoke more than a little Kibajuni. She gave her entire oral evidence through an interpreter in Kibajuni. The IJ concluded that the applicant could speak Kibajuni and had not simply learned it in the period between her interview and the hearing. Thus, there is a firm finding from the IJ that the applicant can speak Kibajuni (para 47), although she can also speak Swahili (of which it is, as the IJ had noted, a dialect).

[7] Turning to aspect "c)" in *AJH etc* (*supra*), the IJ found this:

> "48. With regard to the fact that the Appellant did not know any Somali the case of KS *(infra)* indicates that lack of Somali is consistent with evidence that those living on the islands are less likely to speak Somali than those on the coastline. The Respondent's representative fairly indicated that she was not making any issue of this".

This is a clear finding in fact that the applicant did not know any Somali.

Accordingly, the ultimate conclusion of the IJ was that the applicant is a Somali national, who does not know any Somali but does speak Kibajuni and Swahili.

3. Reconsideration and Submissions

[8] The applicant applied for a reconsideration. The apparent peculiarities of: (1) a person speaking Kibajuni but not being of Bajuni ethnicity; and (2) a person with no Somali being, by implication, one of the majority clans was noticed by the Senior Immigration Judge who ordered a reconsideration on 20 August 2007. However, when two IJs conducted a first stage reconsideration, they considered that no error of law had been established and that the original decision should stand. In reaching this conclusion, the IJs said:

> "36. ...[The appellant] relied more or less entirely on the fact that the Immigration Judge was being inconsistent in finding that the Appellant was from Somalia and yet spoke Kibajuni but not Somali...
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> 37. We need to put this submission into context. As the Senior Immigration judge put it...there was an "apparent acceptance" that the Appellant spoke no Somali. In fact the Immigration Judge makes no finding on this as he concentrated on the Appellant's evidence that she could speak both Swahili and Kibajuni. It follows that we only have the word of the Appellant, whose account has been disbelieved and rejected on a number of matters, that she does not speak Somali. It is true that the Immigration Judge found that the Appellant was from Somalia although we note he gives no reasons for that finding. It may be, and we put it no higher than this, that this finding was an error. We should say that the Immigration Judge was not bound to make a finding on whether the Appellant was from Somalia or not and without knowing his reasons it is difficult to assess whether this finding is sound or otherwise. However we do not consider that the case turns on this and therefore we do not regard the Immigration Judge's failure to give reasons for his finding (or if the finding is wrong) as a material error. In passing we would only say that there is nothing perverse about concluding that someone who speaks Kibajuni is not necessarily from the Bajuni islands.

> 38. Nor do we consider that we have to resolve the issue of whether or not the Appellant is from Somalia. What the case does turn on and what we have to assess are the merits of the Immigration Judge's reasons for his conclusions that she does not have a well founded fear of persecution because of her claims to have been a persecuted Bajuni from Koyama in Somalia".

The IJs held that the IJ had been entitled to conclude that "there was no reasonable likelihood she was from the Bajuni Islands".

[9] The parties presented their submission in writing and these were supplemented and, to a degree, varied in oral argument. The detail of the submissions is not repeated here as the texts are available in their original written form. Suffice it to say that the applicant argued that the respondent had conceded before the IJ (para 44) that, if the applicant had established that she was a Somalian Bajuni, she would not be able to obtain a sufficiency of protection. Many of the reasons given by the IJ for disbelieving the applicant were open to him and the IJs were entitled so to hold.

But there remained the central contradiction in the findings of the IJ that the Applicant was a Somali, who could speak Kibajuni yet was not of the Bajuni clan. There was no evidence before the IJ that there are Somali Kibajuni speakers who are not Bajuni. It is accepted that there are Kibajuni speakers in northern Kenya, who are not Somali. However, that is not the group to which the IJ attributed the applicant. The IJ positively held that the applicant was a Somali Kibajuni speaker from a majority clan. Members of such clans will almost invariably speak Somali. It is accepted that it is not perverse to say that someone who speaks Kibajuni is not necessarily from the Bajuni islands, but the IJ had also held that the applicant's lack of Somali was consistent with the evidence that those Bajuni living on the islands are less likely to speak Somali than those on the coastline. The IJs had erred in holding that the IJ had not found that the applicant did not speak Somali. The IJ had not properly applied the

country guidance cases (*AJH etc* (supra) and *KS (Minority Clans - Bajuni - ability to speak Kibajuni) Somalia CG* [2004] UKIAT 00271).

[10] The respondent countered by submitting that although there may have been errors of law, these were not material. It was accepted that the IJ's finding that the applicant was Somali was a troubling one, which did not sit well with the others in relation to her origins. There was a degree of dissonance. It had also been an error on the part of the IJs in stating that the IJ had not found that the applicant did not speak Somali. Nevertheless, there had been sufficient material upon which the IJ was entitled to disbelieve the applicant's account of coming from Koyama. That being so, the IJ did not have to guddle about searching to find an alternative identity for the applicant. It was not for the respondent to construct an alternative. The IJ had followed the country guidance. The IJ had held that the applicant was not from Koyama and was not a member of a minority clan. However, he made no positive finding that the applicant was from an alternative group or clan. The IJ had taken all factors into account and reached a balanced, lawful and rational conclusion. The IJ had provided adequate and comprehensible reasons for his adverse credibility findings. As the onus of proof lay with the applicant, her appeal fell to be dismissed after the IJ had held that the account of events upon which she relied was incredible. In the absence of a material error of law the application ought to be refused.

4. Decision

[11] The question of whether a material error of law has occurred falls to be answered according to the well known tests which identify what such an error consists of in the context of an appellate jurisdiction. The Court is not satisfied that the AIT misdirected itself in law, given the correct focus on the Country Guidance case of *AJH etc*.

(*supra*). But an error of law occurs also if an AIT proceeds upon a misapprehension or misconstruction of the evidence before it. The error must, of course, go to the root of the decision for it to be regarded as material. But the Tribunal must provide reasons which are sufficient to enable to Court to carry out its appellate function of examining whether such an error has occurred.

[12] It is not disputed that the IJs carrying out the first stage reconsideration proceeded upon a misapprehension of the evidence accepted by the IJ. The IJs state specifically that "in fact" the IJ had not found that the applicant spoke no Somali. This is simply incorrect. In the section of his Determination and Reasons headed "Findings", the IJ referred quite clearly to what he described as "the fact that the Appellant did not know any Somali" (*supra*, para 48). He was not just describing evidence given by the appellant. Furthermore, the finding went beyond holding that the applicant did not speak any Somali; it was that she did not know any Somali at all. Given that the issue of a person's knowledge of Somali is one of the three factors specifically referred to in *AJH etc* (*supra*), it is impossible to assert that this fact was anything other than a material one. The IJs' decision that the original appeal decision be upheld must be regarded as proceeding upon an error of law accordingly.

[13] The IJs proceeded to cast doubt upon the IJ's finding that the applicant was from Somali. There may be a great deal of force in the criticisms levelled by them, but they only serve to demonstrate a possible error on the part of the IJ in making this finding. The IJs may be correct in stating that the IJ did not have to conclude that the appellant was from Somalia or anywhere else. But he did find in fact that she was "from Somalia". The finding cannot be ignored and it is an important one.

[14] The appeal to the IJ could not be resolved, as the IJs suggest (para 38), simply by rejecting the applicant's account of coming from Koyama, having been persecuted as

a Bajuni there. Although it was decided, for sound reasons, that the applicant was not credible about her residence in Koyama, and hence about the persecution she described there, it remained sufficient for the applicant's claim to succeed that she demonstrate only that she was a Bajuni who had come from Somalia. If that were shown to be a real possibility, it is not disputed that she would have a well founded fear of persecution upon a return there.

[15] The IJ determined that she was "from Somalia". This presumably meant that he accepted that that is where she had come from at the material time, rather than, for example that she might be a Somali Bajuni who had been living in, and come from, Kenya. He nevertheless dismissed the applicant's claim because he did not accept that she was a member of a minority clan. It follows, from the IJ's rejection of the applicant's claim to be a member of a minority clan, that she must be a member of a majority clan. But that then presents a further difficulty in terms of the background material. If she is a member of such a clan, why does she not only know nothing of the Somali language but is also a reasonably fluent Kibajuni speaker? There is no explanation for this apparent inconsistency given in the IJ's Determination and Reasons.

[16] One conclusion might have been that the applicant is of Kenyan Bajuni ethnicity, or, as already noted, is of Somali Bajuni ethnicity who was living in Kenya. But the IJ did not hold any of these possibilities demonstrated. The Court thus finds itself in agreement with the sentiments of the SIJ that the IJ's finding that she is from Somalia (although he phrases it as the applicant "being Somali") "sits ill with his apparent acceptance that the appellant speaks no Somali". As set out above, it is an express rather than an "apparent" acceptance and the inconsistency is one which has to be explained before the decision of the IJ in the applicant's case can be regarded as one

which is adequately reasoned and which a reasonable IJ was entitled to reach on the findings of fact made.

[17] For these reasons, the Court considers that: the application for leave to appeal should be granted; the appeal should be allowed; and the appeal to the AIT from the respondent be the subject of a second stage reconsideration. At such a re-hearing no doubt the matters explored before the Court, including whether the applicant is from Somalia and a member of a minority clan can be revisited.