ASYLUM AND IMMIGRATION TRIBUNAL

DM (Majority Clan Entities Can Protect) Somalia [2005] UKAIT 00150

THE IMMIGRATION ACTS

Heard at: Field House
On: 24 May 2005

Determination Promulgated:

27th July 2005

Before:

The Honourable Mr Justice Hodge OBE (President)
Dr H H Storey (Senior Immigration Judge)

Between

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr F Omere of counsel, instructed by Wilson & Co
For the Respondent: Mr L Parker, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellant is a national of Somalia. She appeals against a determination of the Adjudicator, Ms Sarvanjan Kaler, notified on 27 January 2005 dismissing her appeal against a decision to refuse to grant asylum and to refuse to grant leave to enter. There had been a previous determination of this appeal by Adjudicator Mr A L McGeachy, but that pre-4 April 2005 history does not affect how we treat this type of case. By virtue of Article 5 of the Asylum and Immigration (Treatment of Claimants etc) Act 2004 (Commencement No 5 and Transitional Provisions) Order 2005, this appeal now takes effect as a reconsideration pursuant to an order under section 103A of the Nationality, Immigration and Asylum Act 2002, limited to the grounds on which permission to appeal was granted and initially to decide whether the Adjudicator materially erred in law.

2. The grounds of appeal submitted in this case challenge wholesale the complete determination of the Adjudicator. There was no clear focus on the main issue; had the Adjudicator made an error of law. However, the decision on the application for permission to appeal concluded as follows:

> "Insofar as the grounds challenge the [Adjudicator's] adverse credibility findings, I consider that the [Adjudicator] gave sound reasons for concluding that the [Claimant] had failed to give a credible account of her past experiences or of being a member of a minority clan. The [Adjudicator's] limited acceptance at para 29 that the [Claimant] may have suffered from violence in Somalia and her father killed as described was not sufficient to show that she had experienced past persecution or ill-treatment personal to her. Plainly, the [Adjudicator] considered that what she had suffered from in the past was generalised, as distinct from targeted violence and had not suffered it by virtue of any minority clan identity.
>
> Insofar as the grounds contend that the [Adjudicator] was not entitled to consider that the [Claimant] would not be at risk on return simply by virtue of being a female returnee (from a majority clan) firstly the [Adjudicator] in this case found that the [Claimant] would be able to look to family members in Somalia for support and would be returning to a town where she would not be alone and vulnerable, and secondly, the Tribunal and Country Guideline cases [has] not accepted that women returnees constitute a risk category per se. The grounds of appeal do not refer to any background materials that have not been considered by the Tribunal."

3. We entirely agree with these views. The Adjudicator, for sound reasons given in her determination, had not believed the core claims of the Appellant.

4. However, permission to appeal was given on what are described as the "*quality of protection*" issue or, as the Vice President put it when granting permission "*the issue of whether majority clan protection in the context of present day Somalia is capable of affording protection within the meaning of the Refugee Convention and the ECHR*". By para 62(7) Asylum and Immigration Tribunal (Procedure) Rules 2005 (SI No 230), where, as here, an Appellant has been granted permission to appeal to the Immigration Appeal Tribunal against an Adjduicator's determination before 4 April 2005 (this grant was 7 March 2005) but the appeal has not been determined by that date and (as also here) the grant of permission to appeal is treated as an Order for the Tribunal to reconsider the Adjudicator's determination as a result of the Transitional Provisions Order, then this reconsideration "*shall be limited to the grounds upon which the Immigration Appeal Tribunal granted permission to appeal*". Hence this Tribunal which is now carrying out a reconsideration must first decide whether the Adjudicator made a material error of law solely in relation to the quality of protection issue, that being the only basis on which permission to appeal was granted.

5. At paragraph 35 of her determination, under a heading "*Human Rights Appeal*", the Adjudicator quoted "*This Appellant has the protection of family and clan members and it* [sic] *has not established that her rights will be completely denied or nullified, or that the decision is disproportionate*". It is on those rather shaky foundations that the application for permission to appeal on the

quality of protection issue was based. The argument in support of the contentions on behalf of the Appellant run to some 7½ pages in the application for permission to appeal. They do not clearly highlight an alleged error of law. But the question is most clearly stated at para 2.1 in the application:

> "… the Tribunal is requested to consider the point raised at appeal as to whether protection from a majority clan which is intrinsically linked with the protection of a majority clan milita is a suitable form of protection for the purposes of the Refugee Convention and/or the European Convention on Human Rights."

We heard argument on this, but note that the Appellant who had claimed to come from a minority not a majority clan, had, for sound reasons, not been believed.

The Quality of Protection Issue

6. We remind ourselves of the formula approved by the House of Lords in Horvath [2000] 3 WLR 379: persecution = serious harm + lack of state protection. The Appellant in this case had not met the "*serious harm*" test, ie she had not established that on return she faces a real risk of serious harm or treatment contrary to Article 3.

7. However, we agree with Mr Omere that in the context of countries affected by armed conflict or civil war there may be a degree of artificiality in seeking to treat the "*serious harm*" and the "*protection*" tests as entirely separate. As the Court of Appeal recognised in Bagdanvicius [2004] INLR 163, there is a degree of interdependence between the two tests: see paras 42, 55(12). The extent to which there exists a threat to a vulnerable group of serious harm at the hands of an armed group may vary depending on the extent to which it is known that the vulnerable group can obtain protection. A holistic approach is called for. (Since we heard this case, the House of Lords has given its judgment in Bagdanvicius [2005] UKHL 38. In view of what is said by Lord Brown of Eaton-Under-Heywood at para 13, it seems to us that their Lordships left undisturbed what the Court of Appeal said concerning the interdependency between the "*serious harm*" and the "*protection*" tests, choosing rather to address and determine the differently formulated issue posed by Ms Carss-Frisk QC. Largely for this reason we saw no necessity to invite the parties to address us on the implications for our decision in this case of that judgment.) We also recognise that the quality of protection issue is one which arises to a greater or lesser extent in the course of submissions made in Somali cases. For that reason also, we consider it right to examine it further.

8. Mr Omere advanced three main submissions on the quality of protection issue.

9. First, he submitted that the protection said to be effective in this case arose in the context of a country in which there was an absence of state structures as

a result of which one could not properly talk about protection under either the Refugee Convention or the Human Rights Convention since both instruments were predicated on the existence of "*state*" protection.

10. Second, he maintained that neither state nor quasi-state entities could afford protection under either Convention unless they met or sought to meet their obligations under international human rights and international humanitarian law. Majority clan protection in Somalia was intrinsically and heavily reliant on protection by clan militias who are armed groups systematically flouting international law. For persons to qualify as providers of protection it was necessary that they value core human rights and "*demonstrate a general and consistent respect for the rules of international human rights and humanitarian law*".

11. Mr Omere averred that not to accept his principal submissions would entail having, for instance, to accept as suitable providers of protection wealthy/powerful drug barons who flout basic human rights/ humanitarian law in Colombia.

12. In support of these two arguments, Mr Omere cited the Court of Appeal judgment in Gardi [2002] 1 WLR 2755 in which Keane LJ stated the following in relation to state protection in the context of Iraq prior to the fall of the Ba'athist regime under Saddam Hussein:

> "The reference in Article 1A (2) is to an asylum seeker being unable or unwilling to avail himself 'of the protection of that country', a reference to the earlier phrase 'the country of nationality'. That does seem to imply that the protection has to be that of an entity which is capable of granting nationality to a person in a form recognised internationally. That indeed was a point made in the Tjhi Kwet Kue case at page 11. The KAR does not meet that criteria. I see force also in the point made by Hathaway and Foster in their paper at page 46, that protection can only be provided by an entity capable of being held responsible under international law. That decision in Vallaj is not inconsistent with that proposition since the UNMIK regime in Kosovo had the authority of the United Nations plus the consent of the Federal Republic of Yugoslavia. Yet no-one suggests that the KAR or any part of it is such an entity under international law."

13. If relatively well-organised entities such as the KAR authorities in Iraq were not considered to be capable of providing state protection, then, a fortiori, argued Mr Omere, a majority clan in Somalia would also be incapable.

14. Mr Omere also prayed in aid the judgment of the Inn er House of the Court of Session in Saber [2004] INLR 232, which approved the above passage in Gardi.

15. Mr Omere's third submission was developed in response to the reference in the grant of permission to the possible relevance of Article 7 of EU Council Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as

persons who otherwise need international protection and the content of the protection granted (hereafter the "*Refugee Qualifications Directive*").

Our Conclusions on the Quality of Protection Issue

16. Mr Omere did not place before the Tribunal previous reported decisions which have addressed the issue of to what extent the remarks made by Keane LJ in Gardi (see the quotation from SF below) or the reasoning of the Court of Session in Saber should be considered as persuasive. Gardi was a case decided without the court having any jurisdiction to hear it. But, in any event, had Mr Omere done so he would have seen that the Tribunal has held that they are not persuasive. In SF (Sufficiency of Protection-KAA-Michigan Guidelines) Iraq CG [2002] UKIAT 07376, it was stated:

> "13. Mr Vokes secondly asked the Tribunal to take the same view as Lord Justice Keene in Gardi and the Tribunal in Magdeed and conclude that the de facto authorities in control in the KAA were not entities capable of furnishing protection within the meaning of Art 1A(2) of the Refugee Convention. As we explained to Mr Vokes, we consider that on this question we should follow the starred determination of the Tribunal in the case of Dyli [2002] INLR 372 whose reasoning was not contradicted by either Mr Justice Dyson (as he then was) in Vallaj [2001] INLR 455 or the Court of Appeal in Canaj and Vallaj [2001] INLR 342. The judgment of Gardi [2002] 1 WLR 2755 was now a nullity and the remarks of Lord Justice Keene were obiter [sic]. It remains, of course, that the views of a senior judge should carry weight. However, despite being asked to follow the views of Professor Hathaway, it does not appear that his lordship's attention was drawn to the fact that the paper written by Professor Hathaway and Ms Foster was of recent origin and did not reflect the position the same Professor together with several refugee law experts took in the far more widely accepted Michigan Guidelines at paragraph 10 where it was stated that return on internal protection grounds to a region controlled by a non-state entity could be contemplated, albeit only where there was compelling evidence of that entity's ability to deliver durable protection. Nor does it appear that his attention was drawn to the fact that UNHCR`s position is that de facto entities are at least in principle capable of affording protection under the Refugee Convention. Moreover, taking a line through the House of Lords judgment in Adan [1997] 2 All ER 723, we consider there are cogent reasons for taking a pragmatic or functional approach according to which the issue of whether a de facto entity could afford Refugee Convention protection is essentially a question of fact. Such an approach also best reflects the principle of surrogacy according to which international protection should only be granted when there is in fact a denial of domestic protection."

17. In a subsequent Tribunal case, GH (Former KAZ-Country Conditions-Effect) Iraq CG [2004] UKIAT 00248, the Tribunal further addressed the issue of to what extent regard should be had to Saber**.** At paras 102-103 it stated:

> "102. Moreover, the paper relied on does not, as was pointed out in Faraj, represent a settled and accepted view of the law applicable to internal relocation and does not purport to deal as such with protection issues in a claimant's home area. As noted in Dyli at paragraphs 17-18 in Thje Kwet Koe v MIEE [1997] FCA 912, cited in Gardi (no 1) and Saber, Tamberlin J

had made it clear that his interpretation of Article 1A(2) was confined to the situation where the claimant was stateless. Further, the decision of Decary J in Ahmed Ali Zatzoli v MEI [1991] 3 CF 605 does not appear to have been considered in any of the cases referred to above. In that case the Canadian Court had accepted that it was practical protection that was relevant to refugee status rather than the protection of the official government in circumstances of civil war and the passage we quote must be considered in the context that nothing in the judgment suggested that there might be various entities capable of granting nationality. He expressed the proposition more widely in the following terms:

> 'The 'country', the 'national government', the 'legitimate government', the 'nominal government' will probably vary depending on the circumstances and the evidence and it would be presumptuous to attempt to give a general definition. I will simply note here that I do not rule out the possibility that there may be several established authorities in the same country which are each able to provide protection in the part of the territory controlled by them, protection which may be adequate though not necessarily perfect.'

103. It seems to us therefore that not only are the views expressed in Saber arguably obiter but that the issue in relation to protection has never been fully argued in respect of the home area of the claimant or of a situation where internal relocation is in point. It is an area where there remain potentially conflicting views from the international jurisprudence point of view. The decision in Saber is persuasive only so far as the English divisions of the Immigration Appeal Tribunal and Immigration Appellate Authority at least are concerned. In those circumstances the Tribunal and Adjudicators should regard themselves as still bound by the starred decision of Dyli on this issue until such time as there is an authoritative decision to the contrary following full argument."

18. Mr Omere's arguments overlook the fact that under the Refugee Convention there is no reference in the text of Article 1A(2) to the state being the entity which must provide protection. The phrase used is "*country of nationality*". To echo the words of Keane LJ in Gardi, the only protection-related reference in Article 1A(2) is to a person being unable or unwilling to avail himself "*of the protection of that country*", which links with the earlier use of the phrase "*country of nationality*".

19. Mr Omere is wrong to assert that protection under the Refugee and Human Rights Convention can only be afforded when the state concerned has a functioning national government. We accept that Somalia, even now that it has in formal terms a federal government structure, might merit descriptions such as a "*failed state*" or a "*collapsed state*". However, it is not in dispute that Somalia has for some time been and is still a state at international law. One must not confuse the question of statehood or a territory being a country with the question of whether that state or country has a functioning central government. We remind ourselves at this point that Article 1 of the Montevideo Convention on Rights and Duties of States which is widely seen as having become part of customary international law. It provides:

> "The State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other States. "

20. Whilst this definition is not accepted wholly without qualification by international jurists, it is notable that there has been widespread rejection of the view that requirement (c) - government- can only be met if there exists an effective or functioning or orderly central government.

21. We are quite satisfied that at international law Somalia is a state in that it has: (a) a permanent population, (b) a defined territory and (d) capacity to enter into relations with the other States. As regards (c), government, since Somalia was established as a state on the basis of its current territory on 1 July 1960, there have plainly been periods when there was effective government. Thus, subsequent or intervening periods of civil strife and breakdowns of law and order do not per se affect the fact that Somalia is and remains a state.

22. All that is essential for Refugee Convention and Human Rights Convention purposes, therefore, is that as a matter of fact an entity within a country or state affords effective protection. Plainly, an entity which relies for its law and order functions on drug barons or armed militias may be less able to provide effective protection than one which can rely on those functions being performed by properly trained, properly resourced and accountable police or army personnel whose standards of human conduct are exemplary. But variations of this type simply go to the factual question, "*Is protection afforded?*" not the legal question of "*is there an entity or are there entities qualified to afford protection?*"

Article 7 of the Refugee Qualifications Directive

23. Mr Omere's third submission was developed in response to the reference in the grant of permission to the possible relevance of Article 7 of EU Council Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (hereafter the "*Refugee Qualifications Directive*").

24. Mr Omere contended that the text of the EU Refugee Qualifications Directive reinforced his other arguments. We cannot agree. The text of Article 7 reads:

> "Actors of protection
> 1. Protection can be provided by:
> (a) the State; or
> (b) parties or organisations, including international organisations, controlling the State or a substantial part of the territory of the State.
>
> 2. Protection is generally provided when the actors mentioned in paragraph 1 take reasonable steps to prevent the persecution or suffering of serious harm,

inter alia, by operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm, and the applicant has access to such protection.

3. When assessing whether an international organisation controls a State or a substantial part of its territory and provides protection as described in paragraph 2, Member States shall take into account any guidance which may be provided in relevant Council acts."

25. This Article has to be read in the light of recital (19) which states:

> "Protection can be provided not only by the State but also by parties or organisations, including international organisations, meeting the conditions of this Directive, which control a region or a larger area within the territory of the State".

26. We bear in mind that this Directive has not yet been transposed into national law, although it is now part of EU law, having come into force in October 2004. We do not need here to examine the question of whether there is already, in respect of this untransposed directive, an "*interpretive obligation*" on the part of national authorities to act in conformity with its provisions, including national judiciaries. It will suffice for our purposes to proceed on the uncontroversial basis that, even when (as in the case of the 1997 EU Joint Position) the European Community text concerned has no legal effect, it can still be considered as a relevant and persuasive source for interpreting the meaning of the Refugee Convention: see Robinson [1997] Imm AR 568; R v Special Adjudicator [2005] 1 WLR 1003.

27. However, as we pointed out at the hearing, the text of this Directive weakens rather than aids one of Mr Omere's principal submissions, since it expressly rejects the view that only a state in the sense of a country with an official and functioning (and legitimate) government, can provide protection.

28. Mr Omere contended that the Directive did nevertheless support his contentions since its text clearly presupposed the existence of an "*… effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm …*", a system which Somalia patently lacked.

29. We consider Mr Omere's gloss on Article 7(2) goes too far. The subsection does not seek to furnish an exhaustive definition of protection: it only sets out what is "*generally*" required. Second, it does not set out an exhaustive list of the type of "*reasonable steps*" necessary to prevent persecution or suffering from serious harm. We also think that there is real danger in viewing Somalia as wholly devoid of state-like institutions; indeed much of what is contained in the background materials is to opposite effect: see eg sections 1 and 4.1 of the Joint Report 2004 and paras 5.1-5.79 of the April 2005 CIPU Report.

30. There was, however, one separate aspect of the Directive which did initially trouble us. There is reference in both recital (19) and Article 7 to the need for

the providers of protection to control a region or larger area within the territory of the State or to be "*parties or organisations … controlling the State or a substantial part of the territory of the State*".

31. However, on reflection, we do not consider that these provisions assist Mr Omere's submissions, since in the Somalia context and in the particular circumstances of this case, there is no dispute that (i) there are three major clans in Somalia who each control a substantial part of its territory; (ii) on the Appellant's own account she lived in Mogadishu, where one of these three noble clans, the Hawiye, controls a major part of the territory. Moreover, we see no logical difficulty with clan militiamen and other majority clan personnel performing quasi-governmental functions being considered as state actors (as opposed to non-state actors). As suggested by the Court of Appeal in Svazas [2002] 1 WLR 1891 and approved by Auld LJ in Bagdanvicius at paras 47 and 55(11), there will be a continuum of circumstances spanning the state agency/non-state actor divide.

Summary of Conclusions

32. On the issues raised by Mr Omere, we summarise our main conclusions as follows:

    (1) The Tribunal remains of the view that protection under the Refugee and Human Rights Conventions can be afforded by de facto or quasi-state entities. That view is now reinforced by Article 7 of the EU Refugee Qualifications Directive.

    (2) Whether majority clans in Somalia are willing and able to protect is a factual question.

33. For the above reasons, we conclude that the Appellant has failed to identify any material error of law.

34. Accordingly, the decision of the Adjudicator to dismiss the Appellant's appeal stands.

THE HONOURABLE MR JUSTICE HODGE OBE
PRESIDENT