



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/05875/2016

THE IMMIGRATION ACTS

Heard at Glasgow
on 3 January 2018

Determination issued
on 8 January 2018

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

and

ALI HAMID TUTU

Appellant

Respondent

For the Appellant: Mr M Matthews, Senior Home Office Presenting Officer
For the Respondent: Mr K Forrest, Advocate, instructed by Livingstone Brown, Solicitors

DETERMINATION AND REASONS

1. The parties are as above, but for continuity and ease of reference, the rest of this decision refers to them as they were in the FtT.
2. The appellant is a citizen of Sudan. The basis of his protection claim is set out in the respondent's refusal letter dated 25 May 2016, in terms which he does not dispute.
3. The respondent's reasons for refusing the claim are also to be found in that letter.

4. The appellant appealed to the FtT by notice dated 7 June 2016, on generalised grounds, raising no specific issues.
5. FtT Judge Kempton heard the appeal on 23 May 2017 and allowed it in terms of her decision promulgated on 6 July 2017.
6. The SSHD's grounds of appeal are based on the country guidance case of *IM and AI* [2016] UKUT 188, which was not cited in any of the foregoing or at the hearing, and of which the FtT's decision takes no account. *IM and AI* was promulgated on 14 April 2016 and published on the UT's website list of CG cases on 22 June 2016.
7. Mr Matthews referred to the Practice Directions of the Immigration and Asylum Chambers of the FtT and the UT:

12.4 Because of the principle that like cases should be treated in like manner, any failure to follow a clear, apparently applicable country guidance case or to show why it does not apply to the case in question is likely to be regarded as grounds for appeal on a point of law.

8. He referred also to *R (Iran & Others) v SSHD* [2005] EWCA Civ 983 (citing a previous practice direction, which was in similar terms):

27. It will have been noticed that Ouseley J said that any failure to apply a CG decision unless there was good reason, explicitly stated, for not doing so would constitute an error of law in that a material consideration had been ignored or legally inadequate reasons for the decision had been given. This suggestion has now been repeated and adopted in para 18.4 of the AIT Practice Direction. We have no hesitation in endorsing that approach. It would represent a failure to take a material matter into account, which is the third of the generic errors of law we have identified in para 9 above.

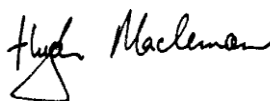
9. *AM and CI* is headnoted thus:

1. In order for a person to be at risk on return to Sudan there must be evidence known to the Sudanese authorities which implicates the claimant in activity which they are likely to perceive as a potential threat to the regime to the extent that, on return to Khartoum there is a risk to the claimant that he will be targeted by the authorities. The task of the decision maker is to identify such a person and this requires as comprehensive an assessment as possible about the individual concerned.
2. The evidence draws a clear distinction between those who are arrested, detained for a short period, questioned, probably intimidated, possibly rough handled without having suffered (or being at risk of suffering) serious harm and those who face the much graver risk of serious harm. The distinction does not depend upon the individual being classified, for example, as a teacher or a journalist (relevant as these matters are) but is the result of a finely balanced fact-finding exercise encompassing all the information that can be gleaned about him. The decision maker is required to place the individual in the airport on return or back home in his community and assess how the authorities are likely to re-act on the strength of the information known to them about him.
3. Distinctions must be drawn with those whose political activity is not particularly great or who do not have great influence. Whilst it does not take much for the NISS to open a file, the very fact that so many are identified as potential targets inevitably requires NISS to distinguish between those whom they view as a real threat and those whom they do not.

4. It will not be enough to make out a risk that the authorities' interest will be limited to the extremely common phenomenon of arrest and detention which though intimidating (and designed to be intimidating) does not cross the threshold into persecution.
 5. The purpose of the targeting is likely to be obtaining information about the claimant's own activities or the activities of his friends and associates.
 6. The evidence establishes the targeting is not random but the result of suspicion based upon information in the authorities' possession, although it may be limited.
 7. Caution should be exercised when the claim is based on a single incident. Statistically, a single incident must reduce the likelihood of the Sudanese authorities becoming aware of it or treating the claimant as of significant interest.
 8. Where the claim is based on events in Sudan in which the claimant has come to the attention of the authorities, the nature of the claimant's involvement, the likelihood of this being perceived as in opposition to the government, his treatment in detention, the length of detention and any relevant surrounding circumstances and the likelihood of the event or the detention being made the subject of a record are all likely to be material factors.
 9. Where the claim is based on events outside Sudan, the evidence of the claimant having come to the attention of Sudanese intelligence is bound to be more difficult to establish. However it is clear that the Sudanese authorities place reliance upon information-gathering about the activities of members of the diaspora which includes covert surveillance. The nature and extent of the claimant's activities, when and where, will inform the decision maker when he comes to decide whether it is likely those activities will attract the attention of the authorities, bearing in mind the likelihood that the authorities will have to distinguish amongst a potentially large group of individuals between those who merit being targeted and those that do not.
 10. The decision maker must seek to build up as comprehensive a picture as possible of the claimant taking into account all relevant material including that which may not have been established even to the lower standard of proof.
 11. Once a composite assessment of the evidence has been made, it will be for the decision maker to determine whether there is a real risk that the claimant will come to the attention of the authorities on return in such a way as amounts to more than the routine commonplace detention but meets the threshold of a real risk of serious harm.
 12. Where a claimant has not been believed in all or part of his evidence, the decision maker will have to assess how this impacts on the requirement to establish that a Convention claim has been made out. He will not have the comprehensive, composite picture he would otherwise have had. There are likely to be shortfalls in the evidence that the decision maker is unable to speculate upon. The final analysis will remain the same: has the claimant established there is a real risk that he, the claimant, will come to the attention of the authorities on return in such a way as amounts to more than the routine commonplace detention and release but meets the threshold of serious harm.
10. Mr Matthews submitted that applying the guidance to the facts as found by the FtT, the decision fell to be reversed.
 11. Mr Forrest relied upon a rule 24 note in response to the grant of permission, and further sought valiantly to maintain the judge's decision along these lines:

- (i) The principle of the country guidance (¶203 – 206 in particular) is to require a rounded assessment of all material factors that may place a person at risk in Sudan.
 - (ii) The judge made such an assessment, and while not specifically finding the appellant to be a member of JEM, she accepted the evidence of the witness Mr Sharaffedin and had regard to additional evidence from the expert witness Mr Verney, which had not been before a previous judge.
 - (iii) The decision was safe, because although unwittingly, it followed the path established by the country guidance.
 - (iv) The expert evidence, given orally and in reports of 2013 and 2017 (the latter postdating the country guidance), provided the key ingredient to justify the outcome.
12. Alternatively, if error was established, Mr Forrest sought a remit to the FtT.
13. Mr Matthews replied thus:
- (i) The decision could not be read as effectively compliant with the guidance.
 - (ii) The FtT made no findings which could bring the appellant within point (1) of the guidance.
 - (iii) The decision contained no equivalent of the finely balanced fact-finding exercise required by point (2), nor findings which might trigger such an exercise. It indicated that the appellant was not known to the authorities.
 - (iv) There were no findings to cross the threshold at point (4).
 - (v) The appellant was bound to fail the final analysis at point (12). He had not established anything to take him beyond the routine and the commonplace to the threshold of serious harm.
 - (vi) The CG case at ¶222 recorded that there was no suggestion from Mr Verney to the effect that involuntary returnees would be at risk for that reason alone. The UT also considered that had that been a general practice, information would have filtered out. When giving evidence to the panel which decided the CG case, Mr Verney had not adhered to what he said in his 2013 report in this case; yet his supplementary report of 2017 was in the same terms as his 2013 report.
 - (vii) There was no basis for deciding on the basis that involuntary returnees were at risk, rather than on the guidance.
 - (viii) The FtT's findings at ¶34 – 36 were based on no more than lengthy absence from the country and return on a travel document (rather than on a passport). That outcome could not be sustained once the guidance was applied.

14. I reserved my decision.
15. Parties are equally to blame for failing to draw the country guidance to the FtT's attention; but the absence of reference to a relevant CG case is an unmistakable error of law, even in the absence of any relevant submission.
16. There may well be cases where without being aware of country guidance a judge reaches a decision along similar lines, and so makes no material error; but this is not such a case.
17. Mr Forrest accepted that it would have been for the appellant to establish that he would have no alternative but to return on a travel document marking him out as a failed asylum seeker, and he had not sought to do so. However, his case would fail, even if he had proved that point.
18. There was, rightly, no argument that the FtT might have been entitled on the evidence to go beyond the guidance, or that the UT in remaking the decision might be entitled to do so.
19. The case is straightforward. On the findings made by the FtT, the appellant is not known to the Sudanese authorities for activities which they are likely to perceive as a threat. Even if he may be subject to routine commonplace detention, that does not reach the threshold of serious harm. His length of absence from Sudan, even together with possible return on a travel document, does not in terms of the guidance qualify for protection.
20. The decision of the First-tier Tribunal is **set aside**. The following decision is substituted: the appeal, as brought to the FtT, is **dismissed**.
21. No anonymity direction has been requested or made.



4 January 2018
Upper Tribunal Judge Macleman