



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/02028/2019

THE IMMIGRATION ACTS

Heard at Field House
On 16 September 2019

Decision & Reasons Promulgated
On 23 September 2019

Before

UPPER TRIBUNAL JUDGE PLIMMER
UPPER TRIBUNAL JUDGE KEITH

Between

IA
(ANONYMITY DIRECTIONS MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008
Anonymity directions were previously made by the First-tier Tribunal, which are maintained. Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Representation:

For the Appellant: Mr P Anderson, Counsel, instructed by Justice & Rights Law Firm
For the Respondent: Ms A Everett, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is an appeal by the appellant against the decision of a Judge of the First-tier Tribunal ('FtT') promulgated on 15 May 2019, by which he dismissed the appellant's appeal against the respondent's decision dated 19 February 2019 of his protection and human rights claim, made on 2 July 2018.
2. The appellant claimed to have a well-founded fear of persecution based on his past ill-treatment and risk on return to his country of origin, Ethiopia, for the following reasons:
 - (a) he was shot in November 2015 by the Ethiopian authorities while attending a demonstration in support of the rights of those of Oromo ethnicity in Ethiopia;
 - (b) he was detained and tortured by the Ethiopian authorities, only being released through family members bribing his captors;
 - (c) he continued to support the Oromo Liberation Front ('OLF') in the UK, whom he had supported prior to attending the 2015 demonstration, along with an associated youth organisation, the 'Qeerro' youth movement.
3. The main points taken against the appellant by the respondent were that:
 - (a) while he was Oromo ethnic origin and could explain the aims and people involved within the OLF, he had not accurately described the OLF badge;
 - (b) he had provided details in a witness statement of 31 January 2019, after his screening and substantive asylum interviews, that he had not provided in the earlier asylum interviews, including:
 - (i) his attendance at OLF meetings,
 - (ii) being beaten and subjected to electronic shocks and having suffered a broken leg;
 - (iii) being questioned about his father's and brother's political activities while in detention;
 - (c) he had been vague about his involvement with the 'Qeerro' movement;
 - (d) he had not provided any evidence of medical treatment while in Italy for a gunshot wound;
 - (e) he had not claimed or progressed asylum claims in third countries through which he travelled before reaching the UK:
 - (i) Italy, where he had received medical treatment;

- (ii) Germany, where he said that he had made an asylum claim but was told that he could only do so with legal representation, which he could not afford to pay for and had lost the papers relating to that claim; and
 - (iii) France;
- (f) the situation in Ethiopia had significantly improved, following a ceasefire agreed by OLF members and the Ethiopian government in July 2018. The generally improving situation had already been confirmed in earlier objective evidence of November 2017.

The FtT's decision

4. On a preliminary point, the FtT declined to adjourn the hearing on the appellant's application, as he wished to obtain a medical report about his gunshot wound (which has since been obtained). For the purposes of this application the FtT noted at [16] that he "*failed to see the relevance of a report*". Further, the FtT did not accept that the author would be able to comment beyond the fact of a gunshot wound; there was no explanation for why the report had not been sought earlier; the appellant had not obtained medical evidence on the wider allegations of torture, such as electrocution and being made to walk on glass; and even if the appellant had suffered adverse treatment, the situation in the Ethiopia had improved since his departure.
5. The FtT did not accept the appellant's credibility, noting at [58], the appellant's inability to describe the OLF badge; the additional information provided in his witness statement; his lack of initiative in contacting the OLF in the UK or the attendance of anyone from the OLF in the UK at the FtT hearing, to corroborate correspondence said to confirm his affiliation to the OLF and risk on return to Ethiopia; his lack of medical evidence about the gunshot wound; and his explanation for why he had not progressed the asylum claim in Germany. The FtT considered country background evidence from a variety of sources at [61] to [65] and concluded at [66] that even if he were an active supporter of the OLF, who had been shot, detained, and tortured, the appellant would not face a risk of persecution on return. This was as a result of the improvement in the treatment of political opponents by the Ethiopian government.
6. For the above reasons, the FtT rejected the appellant's appeal.

The grounds of appeal and grant of permission

7. While not numbered as we have done so below, the grounds appear to be fourfold:
 - (a) ground (1) – the FtT had not given the appellant the opportunity of a fair hearing, in refusing to adjourn the case for production of a medical report, which had since been obtained ([5] of the grounds);

- (b) ground (2) – the FtT improperly considered the appellant’s nervousness and use of the Amharic language in his screening interview, in assessing the appellant’s credibility ([7]);
 - (c) ground (3) - the FtT failed to properly consider documentary evidence from the OLF office in the UK which attested to the appellant’s affiliation, merely because no one from the OLF attended the FtT hearing to corroborate that correspondence ([7]);
 - (d) ground (4) – the FtT failed to consider the authorities of MB (OLF and MTA - risk) Ethiopia CG [2007] UKAIT 00030 and HA (OLF members and sympathisers - risk) Ethiopia [2005] UKAIT 00136; as well as failing to interpret properly the respondent’s own Country Policy and Guidance Note (‘CPIN’) - Ethiopia: Oromos including the 'Oromo Protests' (November 2017) in assessing the continuing risk to those with a previous adverse profile, and where, as in the appellant’s case, he had engaged in recent ‘*sur place*’ activities while in the UK.
8. First-tier Tribunal Judge SPJ Buchanan granted permission on 20 August 2019. He observed that there was an arguable error of law in the FtT’s conclusions about the lack of risk to the appellant on return, if he had been a supporter of the OLF and the subject of previous adverse attention, considering country guidance. The grant of permission was not limited in its scope.

The hearing before us

Submissions

- 9. Mr Anderson relied upon the grounds of appeal. In addition, he sought to argue that the FtT had erred in drawing adverse inferences from additional details in the post-interview witness statement, in contrast to what had been provided in the screening and substantive interviews. However, he confirmed that this had not been previously pursued as a ground of appeal. The thrust of the appeal, being the appellant’s strongest point, as accepted by Ms Everett, was that the FtT’s credibility findings were made, in part, based on the absence of medical evidence, which the FtT had determined to be irrelevant when refusing to adjourn the hearing.
- 10. Ms Everett maintained that even if the FtT’s reference to the absence of medical evidence, when assessing credibility, could be criticised, that was merely one part of the credibility assessment that was carried out and the FtT’s reasoning in relation to the remainder of credibility concerns was sufficient and adequately detailed, at [58.1] to [58.10] of the decision.
- 11. Ms Everett accepted that if any errors around the FtT’s credibility findings were made out, then the FtT’s reasoning at [66] of the decision about the lack of risk to the appellant on his return to Ethiopia, even if he had been subject to previous adverse attention, was inadequate. The appeal therefore turned entirely upon the lawfulness of the FTT’s credibility findings.

The Law

Consideration of adjournment and postponement applications

12. Rule 2 of the Tribunal Procedure Rules 2014 (“the Rules”) and the overriding objective, requires a First-tier Tribunal to deal with the case justly and fairly. When considering a postponement or adjournment application, the FtT must consider not only whether the appellant has demonstrated a good reason for postponing or adjourning the hearing, but also whether the appellant would, as the result of a refusal, be deprived of a fair hearing, noting the authorities of SH (Afghanistan) v SSHD [2011] EWCA Civ 1284 and Nwaigwe (adjournment: fairness) [2014] UKUT 00418 (IAC).

Departure from Country Guidance cases

13. Paragraph 12.4 of the Practice Directions of the Immigration and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal, as amended on 18 December 2018 states that “*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.*” As was stated in NM and Others (Lone women – Ashraf) Somalia CG [2005] UKIAT 00076, at [140], Country Guidance cases

“should be applied except where they do not apply to the particular facts which an Adjudicator or the Tribunal faces and can properly be held inapplicable for legally adequate reasons; there may be evidence that circumstances have changed in a material way which requires a different decision, again on the basis that proper reasons for that view are given; there may be significant new evidence which shows that the views originally expressed require consideration for revision or refinement, even without any material change in circumstances. It may be that the passage of time itself or substantial new evidence itself warrants a re-examination of the position, even though the outcome may be unchanged. It is a misunderstanding of their nature, therefore, to see these cases as equivalent to starred cases. The system does not have the rigidity of the legally binding precedent but has instead the flexibility to accommodate individual cases, changes, fresh evidence and the other circumstances which we have set out.”

Error of law discussion

14. Dealing with the issue of the adjournment request, we find that the FtT acted unfairly in failing to adjourn the hearing to enable the appellant to produce the medical evidence. On the one hand, we had sympathy with the FtT when faced with a lack of explanation for why the medical evidence had not been produced earlier, as recorded at [14] of the decision.
15. On the other hand, at [18], the FtT went on to say that the appellant has to show that he is at risk on return, and the FtT did not see how a report that could only conclude whether the appellant had been shot would have evidential value in determining who had shot him; or could assist the FtT in assessing the continuing risk to the

appellant. In other words, one of the FtT's reasons for refusing the adjournment request was because the medical evidence would be of no relevant evidential value. Indeed, the FtT specifically articulated this as an overarching concern to the appellant's representative at [16].

16. However, when assessing the appellant's credibility, the FtT took the opposite approach. The FtT drew adverse inferences from the absence of medical evidence about the appellant's gunshot wound at [58.6]. While we accept that it was only one factor which led the FtT to conclude that the appellant was not credible, it was sufficiently weighty a factor to be referred to specifically and to be introduced as one of the "*main*" factors why the appellant was not credible. It is difficult to disentangle this from the remainder of the credibility findings. We cannot say with any confidence that but for this finding, the decision on credibility would have been the same. It follows that in drawing adverse inferences from the failure to provide medical evidence, that the FtT earlier regarded to be irrelevant, the FtT has made a material error of law.
17. Dealing with the issue of the FtT's departure from the Country Guidance case of MB; and whether the FtT's reasoning had been appropriately reasoned, with substantial new evidence, or a cogent explanation, Ms Everett was correct to accept that the FtT's reasoning was brief and inadequately reasoned, to the extent that it amounted to an error of law. There was no analysis of the substantial new evidence said to justify a departure from MB. In addition, the reasoning in the decision was potentially contradictory. At [65], the FtT referred to inter-community violence, concluding that there was '*no location evidence that supports the appellant's contention that he is at risk*' on return. However, at [66], the FtT concluded that the location evidence '*is that he would not face a risk of persecution*' on return. Those two conclusions are potentially inconsistent, one suggesting a lack of evidence, the other suggesting positive evidence contradicting the appellant's assertions, but the main error is in the lack of detail in the FtT's analysis to justify departure from MB, let alone consider the plausibility of the appellant's account of previous adverse interest in the context of objective evidence.
18. Taking the FtT's error in failing to adjourn the hearing, which in turn impacted on the assessment of the appellant's credibility, with the flaws in the FtT's assessment of the objective evidence about the situation in Ethiopia, the appellant had been deprived of a fair hearing - see Nwaigwe (supra). Even if the medical evidence could, and should, have been obtained earlier, the two linked issues of the refusal to adjourn and the inadequate analysis of objective evidence give rise to a material error of law.

Decision on error of law

19. In our view, the FtT's decision contained errors of law and we must set it aside, without any preserved findings of fact.

Disposal

20. With reference to paragraph 7.2 of the Practice Direction and the necessary fact-finding, this is a case that has involved unfairness and will require a completely new hearing with extensive fact-finding. In all the circumstances, we are satisfied that the matter must be remitted to the FtT for a complete rehearing, as all aspects of the appellant's appeal need to be reconsidered afresh.
21. The remittal shall involve a complete rehearing of the appeal.

Notice of Decision

The decision of the First-tier Tribunal contains errors of law and we set it aside.

We remit this appeal to the First-tier Tribunal for a complete rehearing.

Directions to the First-tier Tribunal

1. This appeal is remitted to the First-tier Tribunal for a complete rehearing with no preserved findings of fact.
2. The remitted appeal shall not be heard by First-tier Tribunal Judge Shore.

The anonymity directions continue to apply.

Signed *J. Keith*

Date: 18 September 2019

Upper Tribunal Judge Keith