



**Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/03522/2014**

THE IMMIGRATION ACTS

**Heard at Newport
On 11 November 2014**

**Decision Promulgated
On 10 December 2014**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

**TBB
(ANONYMITY DIRECTION MADE)**

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr J Edwards instructed by Duncan Lewis Solicitors
For the Respondent: Mr I Richards, Home Office Presenting Officer

DECISION AND REMITTAL

1. This appeal is subject to an anonymity order made by the First-tier Tribunal pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 (SI 2005/230). Neither party invited me to rescind the order and I continue it pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698).

Introduction

2. The appellant is a citizen of Sudan who was born on 11 January 1996. He entered the United Kingdom clandestinely on 19 April 2013 and claimed asylum. On 15 May 2014, the Secretary of State refused the appellant's claim for asylum and made a decision to move him as an illegal entrant by way of directions under Schedule 2 to the Immigration Act 1971.
3. The appellant appealed to the First-tier Tribunal. In a determination promulgated on 11 July 2014, Judge Page dismissed the appellant's appeal on asylum and human rights grounds.
4. The appellant was granted permission to appeal to the Upper Tribunal by the First-tier Tribunal (Judge Shimmin) on 30 July 2014.
5. Thus, the appeal came before me.

The Issue and Submissions

6. Both the grounds of appeal and Mr Edwards submissions on behalf of the appellant focussed on a single issue.
7. In his determination, Judge Page rejected the appellant's claim to be at risk on the basis of imputed political opinion. In particular, the appellant claimed to have family members who were fighting for the Sudan Liberation Movement and that, although he was not so involved, he had been arrested on a number of occasions by the Sudanese security forces when he had been detained and tortured. Judge Page made an adverse credibility finding and did not accept the appellant's account concerning his family or his detention and ill-treatment.
8. In the grounds of appeal, that aspect of the appellant's case is not challenged. Instead, it is argued that Judge Page failed to consider a different ground upon which the appellant claimed to be at risk on return to Sudan, namely on the grounds of his race. Although the appellant speaks Arabic and is a member of an Arab tribe (the Kababish), he claims that his mother is from a non-Arab Darfuri tribe and his African accent and descent would be distinctive and noticeable on return and he would be at risk as a consequence. It is said that the appellant's brother was killed because of his accent which led his assailants to believe he was of non-Arab Darfuri descent. The appellant claims that he would be at risk on return and internal relocation would not be viable and he relies on the case of AA (Non-Arab Darfuris - Relocation) Sudan CG [2009] UKAIT 00056.
9. Mr Edwards submitted that Judge Page had failed to deal with this aspect of the appellant's claim. He had made no findings despite the fact that the issue was raised in paras 4 and 5 of

Counsel's skeleton argument, in oral submissions before Judge Page and in the appellant's witness statement dated 20 June 2014 at para 2. Mr Edwards submitted that the Judge's error was material to his decision as it was possible that he could have found in the appellant's favour and he relied on the *Operational Guidance Note* for 2011 at para 3.10.4 that linguistic differences were important in Sudan with different dialects being spoken by those of African descent.

10. On behalf of the respondent, first, Mr Richards submitted that the Judge had not erred in law by failing to consider the appellant's claim based upon his race as it had been conceded by his counsel that the appellant had no claim if his credibility was rejected (see para 22 of the determination). That was precisely the finding that Judge Page had made.
11. Secondly, in any event, Mr Richards submitted that any error was immaterial. The appellant was not a "non-Arab Darfuri" who was at risk on return to Sudan as recognised in AA. He was an "Arab Darfuri" who had some association through his mother with a non-Arab tribe. There was no evidence, Mr Richards submitted, that the appellant spoke any differently than other Arab Darfuris. Put at its highest, Mr Richards submitted that the appellant could not have succeeded before Judge Page and, therefore, any error of law was immaterial and the appellant's appeal to the Upper Tribunal should be dismissed.

Discussion

12. I accept Mr Edwards' submission that before the First-tier Tribunal the appellant did rely upon his race as creating a possible risk to him on return. Paragraph 2 of his witness statement is in the following terms:

"My mother was from the African "Zaghawa" and my father was from the Arabic Kababish tribe. I relate to both tribes however when asked what tribe I belong to I refer to my father's tribe Kababish as it is the costume to follow your father's tribe. My mother speaks both the "Rootana" dialect and Arabic. It is very dangerous to be associated with the Zafhawa tribe therefore my mother would only speak Arabic to us. She did not want to put us in danger by speaking her dialect. My mother has a distinctive African accent and although myself and my siblings can only speak Arabic we have also picked up the African accent which is noticeable to other Arabic speakers."

13. Likewise, Counsel for the appellant before Judge Page specifically relied upon this evidence as creating a risk to the appellant on return at paras 4 and 5 of his skeleton argument dated 6 July 2014.

14. Whilst Judge Page does record that Counsel for the appellant accepted that the appellant's credibility determined the outcome of the appeal (see para 22 of the determination) that is said and, in my judgement, was intended to cover only the appellant's claim based upon imputed political opinion. There is nothing in the determination to suggest that Counsel for the appellant disavowed reliance upon the appellant's race as a ground for establishing his Refugee Convention claim. As a result, the Judge erred in law by not considering this aspect of the appellant's claim.
15. The issue remains, however, whether that error of law was material to the decision. Mr Edwards submits that it was and Mr Richards submits that it was not.
16. It may well be that there are a number of obstacles to the appellant establishing his claim based upon his race, not least the adverse credibility finding. As the Judge did not consider the appellant's claim based upon his race, he made no relevant findings, in particular in relation to the appellant's account that his brother had been killed because of his non-Arab accent which is the very basis upon which the appellant now claims to fear return to Sudan. Despite the adverse credibility finding, there was a possibility that the Judge might have accepted this aspect of the appellant's evidence.
17. Mr Edwards sought to argue that the race aspect of the appellant's claim must be taken as having been accepted by the respondent as the Presenting Office did not cross-examine the appellant upon it. He relied, in particular, upon two decisions in the criminal jurisdiction of O'Connell v Adams [1973] RTR 150 and R v Farooqi [2013] EWCA Crim 1649. He submitted that these decisions established that where a professional advocate did not cross-examine a witness on a particular issue that advocate could not put forward a contrary case. I have some doubt whether the approach in a criminal context can be simply imported into the First-tier Tribunal's proceedings in an immigration or asylum appeal. The context is obviously different where, for example, in a criminal case a jury is the decider of fact and the rigid adversarial procedure applied in that jurisdiction has no counterpart in the Tribunal's proceedings.
18. In any event, I do not accept that the respondent, simply by not cross-examining the appellant, must be taken to have accepted the appellant's evidence. The respondent's refusal letter of 15 May 2014 put in issue the appellant's credibility. That carried over to the hearing in the First-tier Tribunal and, in my judgement encompassed the appellant's claim and evidence as a whole. That is also a material difference from the criminal jurisdiction where, without cross-examination, the jury (the decider of fact) will not

necessarily know the prosecution's case and what evidence is, or is not, accepted.

19. Of course, fairness entitles an appellant to have an opportunity to deal with issues of fact in dispute. It might be said that this appellant had such an opportunity given, as it is now said, he relied upon his race as a ground of persecution such that he could have dealt with the issues raised by his evidence, in particular in relation to the death of his brother. But, even if he did not, that is a matter which could well be explored in any further hearing. Albeit with some hesitation I cannot be confident that the Judge was bound to make an adverse finding against the appellant in relation to his evidence about his claim based upon his race.
20. Mr Edwards further relied upon the *OGN* at para 3.10.4 and, in particular, its final sentence which is as follows:

"It is also notable that members of the African tribe speak their own dialect in addition to Arabic, while members of the Arab tribes only speak Arabic."

21. Mr Richards submitted that the appellant's evidence was not that he spoke a dialect but rather, in both his screening and asylum interviews, that he spoke one language namely Arabic. Mr Richards submitted that there was no independent evidence that an appellant with his racial background might speak with an identifiable and different accent.
22. The question which I have to address is whether Mr Richards' submissions lead me to conclude that the appellant was bound to fail in his claim based upon race. It is clear from para 3.10.4 that some persecuted tribes, such as the Fur, Massalit and Zaghawa tribes, speak the same language (Arabic) as their persecutors. Nevertheless para 3.10.4 does identify that language, albeit described as "different dialect" is a "notable" feature of Arab tribes. Likewise the US Department of State, "*2013 Country Report on Human Right Practices: Sudan*" (27 February 2014 at page 26 of 30) states that:

"The population is a multi-ethnic mix of more than 500 tribes, with numerous languages and dialects. Many of these tribes self-identify as Arab, referring to language and other cultural attributes. Other tribes self-identify or are identified by the broader society and members of their tribes as African."

23. For the purposes of deciding whether or not the error of law was material, namely whether the appellant's claim was bound to fail, I need say no more than I cannot confidently conclude that the appellant's claim based upon race was bound to fail. There may well be a number of obstacles that have to be overcome in order for the appellant to succeed but as it was raised before the Judge the appellant was, in my view, entitled to have that claim

examined with appropriate factual findings made in the light of the background material.

Decision and Disposal

24. For these reasons, the decision of the First-tier Tribunal to dismiss the appellant's appeal on asylum and human rights grounds involved the making of a material error of law. That decision is set aside.
25. Mr Edwards invited me, if I accepted his submissions, to remit the appeal to a different Judge of the First-tier Tribunal. That, in my judgement, is not the proper course. The grounds do not in any way challenge Judge Page's findings and determination as written in relation to the appellant's claim based upon imputed political opinion. The grounds, which I have found to be made out, argue in effect that the Judge did not complete his task of determining the appellant's appeal. The proper course, in my judgement, is to remit the appeal to the First-tier Tribunal and to Judge Page in order to deal with the appellant's claim based upon his race.
26. That latter issue will be the only issue for the First-tier Tribunal to determine. The Judge's findings in respect of the appellant's claim based upon imputed political opinion were not challenged and shall stand.
27. Consequently, the appeal is remitted to the First-tier Tribunal and to Judge Page in accordance with the above directions.

Signed

A Grubb
Judge of the Upper Tribunal

Date: **9 December 2014**