



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: AA/08654/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 9 October 2015**

**Decision & Reasons Promulgated
On 28 October 2015**

Before

**DEPUTY UPPER TRIBUNAL JUDGE NORTON-TAYLOR
DEPUTY UPPER TRIBUNAL JUDGE KAMARA**

Between

**R B
(ANONYMITY DIRECTION MADE)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Biggs, Counsel, instructed by MDL Solicitors

For the Respondent: Mr S Whitwell, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. By a decision dated 19 July 2015, Deputy Upper Tribunal Judge Kamara and myself found that the First-tier Tribunal had erred in law when dismissing the Appellant's appeal against the Respondent's decision of 6 October 2014, refusing his asylum claim and to remove him from the United Kingdom by way of directions under section 10 of the Immigration and Asylum Act 1999. The error of law decision is annexed to our decision on the final disposal of this appeal. In summary, we concluded that the

First-tier Tribunal Judge had erred in respect of his assessment of the Appellant's *sur place* claim. In addition, we had real concerns over the consideration of the destination for the Appellant's removal (whether that was to be Sudan or South Sudan, or both).

2. At the continuation hearing, Mr Biggs candidly informed us that he had only been instructed very late in the day, and that he was not in a position to adequately present the Appellant's case in respect of the important issue of nationality and multiple removal destinations. He was minded to seek an adjournment.
3. However, after a useful discussion with Mr Biggs and Mr Whitwell, an alternative route forward emerged. Mr Biggs submitted that the Appellant's appeal could properly be allowed on the limited basis that the Respondent's decision of 6 October 2014 was not otherwise in accordance with the law. This submission was based primarily upon the Respondent's failure to consider the risk on return to Sudan. The Appellant has always asserted to be a Sudanese nationality. The Respondent has maintained the view that the Appellant could be returned to either Sudan or South Sudan. However, the reasons for refusal letter did not deal with a removal to Sudan in the context of international protection, but instead only considers it under the section on Article 8. In addition, the Respondent has never inquired as to the Appellant's nationality, a matter that may have consequences for risk on return to Sudan.
4. In response, Mr Whitwell adopted what he described as a pragmatic and fair position, namely that allowing the appeal on this limited basis was the appropriate course of action in all the circumstances. The Upper Tribunal should not be the primary decision-maker in respect of the issues raised by Mr Biggs. He noted too that the section 10 decision did not in fact name any country of destination.

Remake decision

5. We concluded that the joint position of the representatives was a correct one, and we therefore allow the appeal to the extent that the Respondent's decision of 6 October 2014 was not otherwise in accordance with the law.
6. The Respondent failed to undertake a thorough assessment of the issue of risk on return to Sudan, that being the country of which the Appellant asserted nationality and a country that the Respondent had at no stage ruled out as a destination for removal. It is apparent from the face of the reasons for refusal letter that whilst the issues of detention and JEM activities in the United Kingdom are addressed, there is no express consideration of risk on return to Sudan. Further, the Appellant's ethnicity was never addressed by the Respondent. In the context of Sudan and South Sudan, ethnicity is almost always likely to be of potential relevance in properly assessing risk.

Additional observations

7. In view of the fact that the Respondent will now be reconsidering the Appellant's claim for international protection, we make the following comments. Although we have found that the First-tier Tribunal erred in law, we specifically preserved certain findings of fact from his decision. In particular, his findings that the Appellant had not been detained in Sudan and that his activities on behalf of the JEM in the United Kingdom were opportunistic, were not vitiated by error.
8. In respect of the JEM activities, we are aware that the Upper Tribunal has recently heard a country guidance case on this issue (IM and AI AA/04799/2011 and AA/00746/2013). The outcome of this will have a bearing on the Appellant's case.
9. In reconsidering the Appellant's case, the Respondent will also need to have in mind the inclusion of proposed destinations in any new decision notice, a full risk assessment in respect of both Sudan and South Sudan (if both countries are still to be proposed places of removal), and an investigation into the Appellant's ethnicity.
10. As far as the Appellant is concerned, he might be well-advised to seek expert evidence on the issues of nationality and, if relevant, ethnicity.

Anonymity

11. Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, we make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original Appellant. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings. This direction has been made in order to protect the Appellant from serious harm, having regard to the interests of justice and the principle of proportionality.

Decision

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

We set aside the decision of the First-tier Tribunal.

We re-make the decision by allowing the appeal to the extent that the Respondent's decision was not otherwise in accordance with the law, and the Appellant's claim for international protection remains outstanding before the Respondent awaiting a lawful decision.

Signed

Date: 21 October 2015

H B Norton-Taylor
Deputy Judge of the Upper Tribunal

TO THE RESPONDENT
FEE AWARD

No fee is paid or payable and therefore there can be no fee award.

Signed

Date: 21 October 2015

Judge H B Norton-Taylor
Deputy Judge of the Upper Tribunal

Annex A: The error of law decision



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: AA/08654/2014

THE IMMIGRATION ACTS

Heard at Field House

**Decision & Reasons
Promulgated**

On 17 July 2015

.....

Before

**DEPUTY UPPER TRIBUNAL JUDGE NORTON-TAYLOR
DEPUTY UPPER TRIBUNAL JUDGE KAMARA**

Between

**R B
(~~ANONYMITY DIRECTION NOT MADE~~)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr D Dhanji, Counsel, instructed by MDL Solicitors

For the Respondent: Ms A Fijiwala, Senior Home Officer Presenting Officer

DECISION AND REASONS

Introduction

1. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge K S H Miller (Judge Miller), promulgated on 5 February 2015, in which he dismissed the Appellant's appeal. That appeal was against the Respondent's decision, dated 6 October 2014, to refuse his protection

claim and to remove him from the United Kingdom under section 10 of the Immigration and Asylum Act 1999.

2. Permission to appeal was granted by First-tier Tribunal Judge Grant-Hutchinson on 26 February 2015.

Anonymity

- ~~3. There has been no anonymity direction in this appeal so far and none has been sought from us. At this stage we do not make such an order.~~

Background

4. The Appellant was born on 1 January 1979. His nationality has been, and still is, the subject of debate. For the purposes of the appellate process, the Respondent has stated that he claims to be a national of Sudan. He arrived in the United Kingdom back in May 2003 and claimed asylum. It is unclear why it took the Respondent so long to decide this claim. The Appellant's account was that he was born in Juba in what was then the south of Sudan. He left there alone aged about seven and lived in Khartoum thereafter. He worked for an army officer. He was accused of stealing some documents and imprisoned for forty-five days. He then left the country in 2003. It transpired that he had in fact gone to the Netherlands in 2002, but initially failed to disclose this.
5. Once in the United Kingdom the Appellant began, in 2012, attending some demonstrations in support of the Justice for Equality Movement (JEM), an organisation in opposition to the Sudanese government. A core aspect of the Appellant's claim was that these *sur place* activities would place him at risk on return. In addition, following the creation of the independent state of South Sudan in 2011, the issue of the Appellant's nationality, or potential nationalities became relevant.

Judge Miller's decision

6. The judge did not believe that the Appellant had ever encountered problems whilst in Sudan, finding that the fact of his presence in the Netherlands when he had claimed to be in detention in his home country severely undermined the credibility of the account (paragraph 30).
7. As to the involvement with JEM, Judge Miller found that the Appellant had acted with opportunism in engaging with this organisation so long after arriving in the United Kingdom. He did not accept the written and oral evidence of a witness, the Secretary General of JEM, Mr Sharafedin Hussain. As a result, the judge rejected the claim of any risk on return to Sudan (paragraphs 34-37).
8. On the issue of the destination of removal, Judge Miller concluded that this could be either to Sudan or South Sudan, neither of which would present a risk of persecution or serious harm to the Appellant (paragraphs 38-39).

The grounds of appeal

9. The grounds are threefold: that comments made by the judge at the hearing indicated a prejudice against the Appellant; that the *sur place* had not been adequately considered; and that the judge had erred by failing to make a clear finding on nationality and giving inadequate consideration to the alleged possibility of a return to South Sudan.

The grant of permission

10. Permission was expressly refused on ground one because no supporting evidence was provided, as it should have been (see, for example, BW [2014] UKUT 568 (IAC)). Permission was granted on the other two grounds.

The hearing before us

11. Mr Dhanji fully accepted that the allegations of inappropriate comments by the judge had not been backed up with evidence, and he quite rightly did not seek to argue the point any further. We need say nothing more about ground one.
12. In respect of ground two, Mr Dhanji accepted that the judge was entitled to find that the Appellant's JEM activities had been opportunistic. However, in light of well-established case-law, this was not fatal to a protection claim. Judge Miller had not engaged with the country information at all. In relation to ground three and the nationality point, it was submitted that there was only an assumption by the judge that a removal to South Sudan was possible. The issue did not appear to have been addressed fully at the hearing. There was no assessment of risk on return to South Sudan. If there was an error of ground two, ground three became relevant. It was accepted that the Appellant's representatives had not adduced evidence as to the nationality laws of South Sudan.
13. Ms Fijiwala submitted that even if the judge had erred in relation to his consideration of the *sur place* issue, it was immaterial because even at its highest the claim was bound to fail. Paragraph 13(c) of MM (Darfuris) Sudan CG [2015] UKUT 10 (IAC) shows that the authorities in Sudan will not have all the information available to officials in the United Kingdom about government opponents and activists. As to ground three, the Respondent's reasons for refusal letter mentioned both countries. Judge Miller dealt with both countries in his decision. Even if there was an error on ground two, it was immaterial to the outcome of the appeal as a whole.

Decision on error of law

14. We find that Judge Miller erred in law in his consideration of the *sur place* issue.

15. As Mr Dhanji accepted, the judge was entitled to conclude that the Appellant had acted opportunistically when engaging with the JEM in this country. However, it is by now trite law that such a conclusion is not determinative of the issue of risk on return (see, for example, Danian [2000] Imm AR 96, YB (Eritrea) [2008] EWCA Civ 360, and article 4(3)(d) of the Qualification Directive).
16. As we read paragraphs 34-37 of Judge Miller's decision, he has effectively treated the absence of a genuine commitment to political activities by the Appellant as being determinative of the issue of risk on return. We find this to be so not only from the observations stated in these paragraphs, but also the complete absence of any consideration of the country information which we accept was cited before him at the hearing.
17. In light of the above, the judge misdirected himself in law as to the correct approach on the *sur place* issue. He also failed to have regard to relevant evidence, namely the country information before him. It follows too, that his reasons for rejecting the *sur place* claim are inadequate.
18. The error is material insofar as a removal to Sudan is concerned. First, the MM decision does not specifically deal with *sur place* activities (see paragraphs 5 and 16) and so is not fatal to the Appellant's case. Second, and contrary to Ms Fijiwala's submission, the country information before Judge Miller and to which we were referred by Mr Dhanji does disclose an arguable case (we put it no higher) that even low level activists in the United Kingdom may attract adverse interest on return to Sudan (see pages 1-2, 6, 9, 26, 27, 69, and 74 of the Appellant's bundle). The Appellant's claim was not bound to fail.
19. The issue of the destinations for removal is not quite as straightforward as the first. It is accepted by Mr Dhanji that little if any evidence was adduced on the issues of South Sudanese citizenship and any risk on return there. It appears as though those representing the Appellant did not engage with the issues as best they might have. To that extent Judge Miller had little to go on.
20. Ultimately though, we conclude that as we have found an error of law in respect of ground two, and that this is material to the issue of risk on return to Sudan, we will exercise our discretion under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007 and set aside Judge Miller's decision. Our reasons for this are as follows.
21. First, once *an* error of law is identified, there is then the power to set aside. It need not be the case that errors on all issues raised are found to exist.
22. Second, in an appeal in which two destinations for removal are proposed, it is important, in particular in view of the need for anxious scrutiny and Article 33 of the Refugee Convention, to have sound risk assessments for both countries. Here, no such assessment exists for Sudan.

23. Third, Ms Fijiwala acknowledged before us that it remains the Respondent's position that the Appellant could be removed to either Sudan or South Sudan. Thus, if the judge's decision were to stand in its entirety, the Respondent could potentially seek to return the Appellant to Sudan, a place in respect of which a sound risk assessment has not been undertaken. To our mind, that is an unacceptably precarious basis on which to base further administrative action by the Respondent.
24. Fourth, whilst the Respondent's reasons for refusal letter does mention both Sudan and South Sudan, the former is only stated in the context of consideration of the Article 8 claim and not within the ambit of the protection claim (see paragraph 18). Further, the section 10 notice of immigration decision itself does not state either country. So, although the Appellant and his representatives might be said to have been on at least some notice as to the Respondent's proposed destinations, this was not expressed as clearly as it should have been.
25. Fifth, at the hearing before Judge Miller there does not appear to have been any substantive exploration of South Sudan in the context of citizenship and/or risk on return there. The judge's conclusion that the Appellant could safely return to South Sudan is briefly expressed and appears to be based on an assumption that he has relatives there (paragraph 39). It is right too that there is no clear finding of fact on nationality, although the Appellant did not provide evidence on the point.
26. In view of the above, and bearing in mind the importance of the issue in any protection claim, we set aside the decision of Judge Miller.
27. Two findings of Judge Miller should be and are preserved, as they have not been challenged and were open to him. First, that the Appellant was never detained in Sudan; second, that his involvement in the JEM thus far has been opportunistic.
28. We note that there has never been any exploration as to the Appellant's ethnicity.

Disposal

29. Neither representative sought a remittal to the First-tier Tribunal. Both agreed that a continuation hearing in the Upper Tribunal was appropriate. This appeal will require further evidence (including perhaps oral evidence from the Appellant) and submissions. As a result, we were unable to re-make the decision at the hearing and so we adjourned the matter for a continuation hearing before us.
30. As discussed at the hearing, the issues are now:
 - a) The Appellant's nationality, in respect of both Sudan and South Sudan;
 - b) Risk on return to Sudan for the Appellant as a low level activist for JEM in the United Kingdom;

- c) Risk on return to South Sudan;
- d) The Appellant's ethnicity and any relevance this may have on risk.

Decision

The making of the decision of the First-tier Tribunal did involve the making of an error of on a point of law.

We set aside the decision of the First-tier Tribunal.

We adjourn the appeal for a continuation hearing before Deputy Upper Tribunal Judges Norton-Taylor and Kamara on a date to be fixed.

Directions

- 1) Any further evidence relied upon by the parties shall be filed and served with the other side and Upper Tribunal no later than 14 days prior to the date of the continuation hearing;
- 2) Oral evidence from the Appellant may be permitted, but a witness statement must be provided (see direction 1, above);
- 3) Skeleton arguments/written submissions from both parties shall be filed and served with the other side and Upper Tribunal no later than 14 days prior to the date of the continuation hearing;
- 4) An Arabic interpreter is required for the continuation hearing.

Signed

Date: 19 July 2015

H B Norton-Taylor
Deputy Judge of the Upper Tribunal