



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA011702015

THE IMMIGRATION ACTS

Heard at North Shields
On 9 June 2017

Decision & Reason Promulgated
On 23 June 2017

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

M O A
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr D McCormick instructed by Halliday Reeves Law Firm
For the Respondent: Mr S Whitwell, Senior Home Office Presenting Officer

DECISION AND REASONS

1. I make an anonymity order under Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, precluding publication of any information regarding the proceedings which would be likely to lead members of the public to identify the appellant, preserving the anonymity order made by the first-tier tribunal.
2. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Cope promulgated on 07/10/2016, which dismissed the Appellant's appeal on all grounds.

Background

3. The Appellant was born on [] 1997 and insists that he is a national of Sudan. On 09/09/2015 the Secretary of State refused the Appellant's protection claim.

The Judge's Decision

4. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Cope ("the Judge") dismissed the appeal against the Respondent's decision. Grounds of appeal were lodged and, on 31/03/2017, Upper tribunal Judge Perkins gave permission to appeal stating inter alia

2. I give permission on each ground although I am not presently impressed with the complaint that the Judge made observations about the appellant's skin tone. Given that the appellant said that he was at risk because he would be perceived as a "black" Libyan it is not obviously wrong for the Judge to note the appellant's skin tone and consider his observations with the rest of the evidence before making a finding, although it may (be) that is not what the Judge did.

3. I am more concerned that the adverse credibility findings might be unsound because the Judge misunderstood some of the evidence as alleged and/or because of interpreting problems.

4. Interpretation is not an art and there is usually room to say that things could be done differently. However there is here evidence that the interpretation of the appellant's evidence about his education was mistranslated in a way that impacted on the adverse credibility findings.

5. It is arguable that there was a material error.

The hearing

5. (a) For the appellant, Mr McCormick moved the grounds of appeal. He told me that the appellant's ethnicity is a crucial aspect in this case. The appellant claims that he is Sudanese. The respondent believes that the appellant is Libyan. The appellant's alternative case is that he cannot be safely returned to Libya because there he will be perceived to be a "Black Libyan". Mr McCormick dwelt on [124] to [127] of the Judge's decision. He seized on the Judge's use of the word "invidious" in [124] of the decision, and provided me with dictionary definitions and synonyms for that word. He then went on to say that the Judge was wrong, at [125] of the decision to compare the appellant's skin colour to the skin colour of the interpreter. He told me that [125] creates a perception of bias to the impartial observer. When pressed, Mr McCormick made it clear that he is not suggesting that there was anything wrong with the Judge's conduct. He is not suggesting that the Judge made comments that any rational person would think were racist or offensive. What he does say is that the comparison between the skin of the appellant and the skin of the interpreter is the wrong test to apply in determining whether or not the appellant would have the

appearance of a Black Libyan. Mr MacCormack relied on paragraphs 7, 8 and 9 of Elayi (Fair Hearing – Appearance : India): UTIAC 15 Nov 2016

(b) Mr McCormick moved the second ground of appeal. A bundle was prepared for the appellant for the hearing before me. Document 111 of that bundle is a witness statement from a certified interpreter who is employed by those instructing Mr McCormick. He complains about the quality of interpretation by the court interpreter. Mr McCormick told me that, during the hearing before the First-tier, he received an email from his instructing solicitors telling him that the court interpreter made errors in interpretation. He moved to adjourn. His application to adjourn is dealt with by the First-tier Judge between [6] and [11] of the decision. Mr MacCormack referred me to Nwaigwe (adjournment: fairness) [2014] UKUT 418 (IAC), and told me that the Judge was incorrect to refuse his application to adjourn. He took me to [13] of the decision, and complained that the Judge did not take adequate account of the complaints of an Arab speaking interpreter employed by his instructing solicitors.

(c) Mr McCormick turned to the third ground of appeal. He reminded me that part of the evidence before the First-tier was a Report from Peter Verney. He summarised the terms of the report and the conclusions of the report's author. He told me that the Judge gives inadequate reasons for rejecting the expert report. He told me that the Judge displayed clear and unjustified disregard for the evidence of a recognised expert.

(d) Mr McCormick moved to the fourth ground of appeal. He took me to [72] of the decision and told me that the Judge placed too much reliance on fingerprint evidence and misinterpreted the evidence relating to the appellant's knowledge of his journey across continental Europe. He told me that the misinterpretation of evidence affected the Judge's approach to credibility.

(e) Mr McCormick urged me to allow the appeal and set the decision aside.

6. (a) Mr Whitwell relied on the rule 24 note for the respondent. He told me that what is argued that the appellant amounts to nothing more than a disagreement with the conclusions of the First-tier tribunal Judge. He told me that the decision is not infected by errors, material or otherwise. He told me that the decision is a carefully reasoned decision, containing findings of fact drawn from the evidence placed before the Judge. He told me that the Judge took correct guidance from relevant caselaw before reaching conclusions which were well within the range of reasonable conclusions available to the judge.

(b) Mr Whitwell took me to [126] of the decision and told me that, there, the Judge makes it clear that he does not base his decision on the appellant's appearance. He told me that there is no substance in what is argued as the first ground of appeal for the appellant. The Judge makes an observation which records nothing more than the

obvious, and then sets it to the side to make a decision based on the evidence placed before him.

(c) Mr Whitwell turned to the second ground of appeal. He took me to [11] of the decision and told me that, despite what is said there, the respondent's position (at least for the purposes of this appeal) is that an application to adjourn was made. He told me that the Judge adequately dealt with the application to adjourn, and then referred me to [13] where the Judge clearly states that the only area of confusion related to a passage of evidence about the appellant's education, and not to the substantive issues upon which the appeal turns. He told me that the Judge manifestly considered the question of fairness to the appellant before deciding that there is no need to adjourn. He told me that the Judge was clearly satisfied that there were no errors in either interpretation or comprehension and that the interests of the appellant were not prejudiced.

(d) Mr Whitwell told me that from [78] of the decision the Judge considered the expert evidence in this case. He told me that the Judge sets out perfectly adequate reasons, between [78] and [90] of the decision, for deciding what weight to give to the expert report provided by Mr Verney. He reminded me that the question of weight to give to evidence is a question for the First-tier Tribunal Judge. He told me that the third ground of appeal amounts to nothing more than an expression of the appellant's disgruntlement with the reasonable conclusions reached by the First-tier Judge.

(e) Mr Whitwell addressed the fourth ground of appeal. He took me to [73] of the decision. He told me that the Judge has not placed unquestioning reliance on either the fingerprint evidence or the appellant's account of his journey to the UK. Instead the Judge takes a holistic approach to all the evidence before him and found that the appellant's account of bewilderment about his journey is contradicted by other sources of evidence.

(f) Mr Whitwell told me that the Judge's fact-finding process is beyond criticism, that the Judge took correct guidance in law, and then reach conclusions which were well within the range of reasonable conclusions available to the Judge. Mr Whitwell told me that the grounds of appeal amount to nothing more than a desperate disagreement with the facts as the Judge found them to be. He told me that the decision does not contain any material errors of law and asked me to dismiss the appeal and allow the decision to stand.

Analysis

7. The first ground of appeal is that the Judge strays beyond judicial knowledge in assessing the appellant's nationality. Mr McCormick told me that it is a crucial aspect of the appellant's claim is that he is Sudanese. In the alternative, the appellant argues that he cannot be returned to Libya because he will be perceived as a non-Arab, black, Libyan. He took me to [124] to [126] of the decision and told me that

there the Judge comments on the appellant's skin colour, & compares the tone of the appellant's skin to the skin tone of the court interpreter. He told me that the Judge should not have used his own observations of the colour of the appellant skin as part of his determination of the appellant's nationality and ethnicity.

8. Mr McCormick relied on Elayi (Fair Hearing - Appearance : India): UTIAC 15 Nov 2016 and told me that an impartial observer would draw the impression that the Judge acted unfairly. He told me the Judge based his decision on the appellant's appearance.

9. In B (Kosovo) 2003 UKIAT 00013 the Tribunal said that, whilst a witness's demeanour is said to be a very unreliable guide to credibility, his personal appearance may in some cases form a legitimate part of the assessment of the risk (if any) that he faces. The examples given were the scarring of Tamils returning to Sri Lanka and, in that case, the non-Roma like appearance of a Gorani returning to Kosovo.

10. There is no merit at all in the first ground of appeal. Mr McCormick's suggestion is that a Judge only acts fairly if he ignores what he sees right in front of him. That is simply wrong. In this case the Judge is beyond criticism because, not only does he set out what he could see, he says why the appellant's evidence is not consistent with his observations and then carefully sets his observation aside to make findings of fact drawn from the evidence placed before him. At [126] the Judge says

"I make it clear that I have not based my decision upon this factor."

11. At [129] the Judge clearly states that he cannot rely on the appellant's evidence because of contradictions and omissions in the appellant's evidence. At [130] the Judge sets out his reasons for finding that the appellant's account is implausible. Between [127] & [138] the Judge provides detailed reasons for finding that the appellant is neither a credible nor a reliable witness. The comment about the appellant's skin tone at [124] is nothing more than an observation. It is obvious that that observation does not form part of the Judge's assessment of credibility. It is obvious that that observation is nothing more than a passing comment in a detailed and flawless examination of every source of evidence. It is equally obvious that it is not because of the difference in skin tone of two men sitting together in front of him that the Judge rejects the appellant's account. It is the poor quality of the appellant's own evidence which counts against him.

12. The second ground of appeal relates to the refusal of an application to adjourn. Mr Whitwell conceded that an application to adjourn was made by Mr McCormick in the course of the hearing. The application to adjourn was made because Mr McCormick was told by his instructing solicitor's that their own qualified Arabic community interpreter believed that the court interpreter had made some errors in interpretation.

13. The 2014 Procedure Rules Rule 4(3)(h) empowers the Tribunal to adjourn a hearing. Rule 2 sets out the overriding objectives under the Rules which the Tribunal "must seek to give effect to" when exercising any power under the Rules. The overriding objective is deal with cases fairly and justly. This is defined as including

(a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties and of the Tribunal; (b) avoiding unnecessary formality and seeking flexibility in the proceedings; (c) ensuring, so far as is practicable, that the parties are able to participate fully in the proceedings; (d) using any special expertise of the Tribunal effectively; (e) avoiding delay so far as compatible with proper consideration of the issues.

14. In Nwaigwe (adjournment: fairness) [2014] UKUT 00418 (IAC) it was held that if a Tribunal refuses to accede to an adjournment request, such decision could, in principle, be erroneous in law in several respects: these include a failure to take into account all material considerations; permitting immaterial considerations to intrude; denying the party concerned a fair hearing; failing to apply the correct test; and acting irrationally. In practice, in most cases the question will be whether the refusal deprived the affected party of his right to a fair hearing. Where an adjournment refusal is challenged on fairness grounds, it is important to recognise that the question for the Upper Tribunal is not whether the FtT acted reasonably. Rather, the test to be applied is that of fairness: was there any deprivation of the affected party's right to a fair hearing?

15. On page 111 of the appellant's bundle for this hearing, there is a witness statement from Mr Aidross, the Arabic community interpreter employed by the solicitors instructing Mr McCormick. His criticisms of the court interpreter are contained between paragraphs 7 and 10 of his witness statement. He says that the appellant's name was not translated fully; that there was confusion when questions were asked about the appellant's education; he alleges that the interpreter did not translate full sentences, and says that the interpreter frequently spoke in the third person rather first person.

16. The Judge deals with the application to adjourn between [7] and [14] of the decision. At [10] he records that no specific challenge was taken to any passage of evidence & that he was not provided with any detail of Mr Aidross' qualifications and proficiency. At [13] the Judge records that there were no obvious difficulties in translation or comprehension, but there had been some confusion over the words and expressions "*drama*" and "*theatre studies*"

17. What the Judge records in the decision is consistent with what Mr Aidross says in his witness statement. Both the record of proceedings and the Judge's decision disclosed that a great deal of evidence was led before the First-tier. The only complaints relate to questions about the appellant's education and his full name, and the use of the third person rather than the first person. No challenge is directed to the evidence in relation to the substance of the appellant's protection claim.

18. I have more information than the First-tier Judge because I have the witness statement of Mr Aidross. Even though I have the benefit of Mr Aidross' witness statement, I still have no information at all about his qualifications and experience. I do not know whether Arabic is his first language or his second language. I do not know where he learned to speak Arabic; I do not know what dialect he speaks; I still do not know whether that dialect differs from the dialect spoken by the appellant and the court interpreter. All that I have is a complaint that a few words, which were peripheral to the appellant's claim, would have been interpreted differently by Mr Aidross.

19. The quality of interpretation is important. The record of proceedings and the decision of the First-tier Judge indicate that the First-tier Judge was alive to the need to ensure accuracy of interpretation; and that the First-tier Judge was provided with the appellant's evidence and that there was no error in the translation of that evidence. It is realistically possible that two native Arab speakers will translate the meaning of a sentence accurately by using different English words which convey the same meaning. The allegation that there was an error in interpretation which materially affected the outcome of this case is not made out.

20. In any event, it is apparent that there was no unfairness in the First-tier Judge's decision to refuse the application to adjourn. Between [6] and [15] of the decision the First-tier Judge gives adequate reasons for refusing the application to adjourn.

21. The third ground of appeal relates to the way in which the First-tier Judge dealt with the expert evidence of Peter Verney. The appellant's position summarised at paragraph 17 of the grounds of appeal were Mr McCormick writes

It is the submission of the appellant that the IJ has had a clear disregard for the evidence of Mr Verney.

22. In MF (Albania) v SSHD 2014 EWCA Civ 902 (a blood feud case) the Court of Appeal decided that it was for the tribunal, not the expert, to decide whether an applicant would be at risk on return. It was neither appropriate nor helpful for an expert to express a view on specific factual questions bearing on the situation of a particular applicant such as whether he could safely relocate or whether he could obtain support from other members of the family, if that view was based on nothing more than a general understanding of local conditions.

23. In AAW (expert evidence - weight) Somalia [2015] UKUT 673 (IAC) it was held that a failure to comply with the Senior President's Practice Direction may affect the weight to be given to expert evidence. Any opinion offered that is unsupported by a demonstration of the objectivity and comprehensive review of material facts required of an expert witness is likely to be afforded little weight by the Tribunal. In particular, a witness who does not engage with material facts or issues that might detract from the view being expressed risks being regarded as an informed advocate

for the case of one of the parties to the proceedings rather than an independent expert witness.

24. At [40] of the decision, the Judge sets out an introduction to Mr Verney's report. Between [76] and [90] the Judge carries out a careful consideration of the contents of the report. A fair reading of [76] to [90] would leave the impartial, objective, reader in no doubt at all that the Judge has carefully considered Mr Verney's report. There is neither merit nor substance in Mr McCormick's assertion that the Judge has "*has had a clear disregard*" for Mr Verney's written evidence. It is abundantly clear that the Judge has correctly assessed Mr Verney's evidence. The Judge could only have demonstrated disregard for the evidence if it had not been taken into account. 15 paragraphs of the decision are devoted to Mr Verney's report.

25. What is really argued is that the appellant wishes that the Judge had given more weight to Mr Verney's report. The question of the weight to be given to evidence is a matter for the First-tier Judge. In Green (Article 8 - new rules) [2013] UKUT 254 (IAC) the Tribunal said that

Giving weight to a factor one way or another is for the fact finding Tribunal and the assignment of weight will rarely give rise to an error of law.

26. The Judge gives more than adequate reasons for deciding not to place any great weight on Mr Verney's report. The third ground of appeal is nothing more the expression of the appellant's wish that the Judge had reached a different decision. The decision that the Judge reached is carefully reasoned and is well within the range of decisions reasonably available to the Judge.

27. The final ground of appeal relates to the Judge's treatment of fingerprint evidence. The focus for this ground of appeal lies between [70] and [75] of the decision. In the grounds of appeal, counsel for the appellant focuses on [72], and in particular the final sentence of [72].

28. It is wrong to try to view [72] (or any one of the 172 paragraphs of this decision) in isolation. A complete reading of the decision demonstrates that between 70 and 75 the Judge carefully analyses each strand of evidence before reaching his conclusion. It is clear that the Judge's conclusion is not based on what the appellant may have been told by his travelling companion. The thrust of what the Judge says is that the appellant chose not to mention that he had been fingerprinted in European and Scandinavian countries until the Eurodac result was disclosed.

29. The real complaint in grounds four relates to the weight that the Judge attaches to various parts of the evidence. As I have already indicated, the question of weight is a question for the First-tier Judge.

30. In Shizad (sufficiency of reasons: set aside) [2013] UKUT 85 (IAC) the Tribunal held that the Upper Tribunal would not normally set aside a decision of the First-tier

Tribunal where there has been no misdirection of law, the fact-finding process cannot be criticised and the relevant Country Guidance has been taken into account, unless the conclusions the Judge draws from the primary data were not reasonably open to him or her.

31. In this case, there is no misdirection in law & the fact-finding exercise is beyond criticism. The decision is not tainted by a material error of law. The Judge's decision, when read as a whole, sets out findings that are sustainable and sufficiently detailed.

CONCLUSION

32. No errors of law have been established. The Judge's decision stands.

DECISION

33. The appeal is dismissed. The decision of the First-tier Tribunal stands.

Signed

Paul Doyle

Date 20 June 2017

Deputy Upper Tribunal Judge Doyle