Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/06098/2016

THE IMMIGRATION ACTS

Heard at Newport (Columbus House)	**Decision & Reasons Promulgated**
On 7 September 2017	**On 3 October 2017**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

A E
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr O Manley instructed by Duncan Lewis Solicitors
For the Respondent: Mr I Richards, Senior Home Office Presenting Officer

DECISION AND REASONS

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) I make an anonymity order. Unless the Upper Tribunal or Court directs otherwise, no report of these proceedings shall directly or indirectly identify the Appellant. This direction applies to both the appellant and to the respondent and a failure to comply with this direction could lead to Contempt of Court proceedings.

Background

2. The appellant is a citizen of Sudan who was born on [ ] 1960. He arrived in the United Kingdom and claimed asylum on 1 March 2005. That claim was refused on 27 April 2005 and his subsequent appeal was dismissed in June 2005. The appellant subsequently left the UK but returned on 2 March 2011 and made a further claim for asylum which was refused on 23 March 2011. Further submissions were rejected and following judicial review proceedings, the appellant's claim was reconsidered and refused in a decision on 20 March 2016.

3. The appellant appealed against that decision to the First-tier Tribunal. The basis of his claim was that he was a member of the Beja Congress and that he had continued his political activities in the United Kingdom.

4. The appeal was heard by Judge O'Brien on 25 October 2016. In a decision promulgated on 5 December 2016, Judge O'Brien dismissed the appellant's appeal on all grounds. In particular, he did not accept that the appellant had been a member of the Beja Congress and was, as a result, at risk on return. Further, whilst the judge accepted that the appellant had been involved in some political *sur place* activities in the UK, he found that they did not create a real risk of persecution on return.

The Appeal to the Upper Tribunal

5. The appellant sought permission to appeal to the Upper Tribunal. Permission was initially refused by the First-tier Tribunal but on 23 March 2017 the Upper Tribunal (DUTJ Taylor) granted the appellant permission to appeal.

6. On 31 March 2017, the Secretary of State filed a rule 24 notice seeking to uphold the judge's decision.

Discussion

7. Mr Manley relied upon the two grounds of appeal. He submitted that the judge had been wrong to apply Devaseelan [2003] Imm AR 1 in finding, in accordance with the earlier Tribunal's findings, that the appellant had not established his involvement with the Beja Congress prior to him leaving Sudan including his claimed arrest and detention. Mr Manley submitted that the judge had been plainly wrong not to have regard to a letter dated 10 June 2015 from the Beja Congress UK and Ireland, which had been authenticated by the expert Mr Verney who gave oral evidence before the judge, attesting to the appellant's membership of the Beja Congress. Secondly, in rejecting the appellant's claim based upon *sur place* activities, the judge had failed properly to consider the expert evidence of Mr Verney. Finally, Mr Manley submitted that the judge had failed properly to deal with the appellant's claim to be at risk simply as a failed asylum-seeker.

8. The judge dealt with both the evidence from the Beja Congress and that of Mr Verney at paras 33-34 as follows:

> "33. … I was provided with 2 letters from Beja Congress UK and Ireland, in each of which it is said 'I wish to reaffirm [the appellant's] membership of the Beja Congress since 1980. He took up membership in Port Sudan that year.' However, in each letter, the author is unable to provide contact information for members of Beja Congress that would be able to confirm that membership. Each letter refers to particular increased activities since 2012.
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> 34. Therefore, the new evidence of the Appellant's activities before he left Sudan is vague, unparticularised and unsubstantiated by evidence from people with direct knowledge of this participation or activity. Moreover, it would appear from Mr Verney's report that the Appellant contacted Beja Congress immediately after arrival in the United Kingdom. Whilst it is said that they did not write him a letter straightaway because they waited until they were able subsequently to identify him through mutual connections, the Appellant described to Mr Verney how he met with two UK-based Beja Congress officials. It is entirely inexplicable, therefore, why this evidence was not available and could not reasonably have been available at the last hearing. Therefore, applying **Devalseelan**, I treat as conclusive the findings of Immigration Judge Nicholson regarding the extent of the Appellant's involvement in Beja Congress before he left Sudan and also whether he was arrested and detained as result."

9. Consequently, in para 35 the judge concluded:

> "I reject the Appellant's claim to have been a recruit for the Beja Congress in Sudan."

10. Mr Manley submitted that in para 34 the judge had been wrong to find it was "inexplicable" why the evidence from the Beja Congress official had not been available earlier and could not reasonably have been available at the last hearing. He submitted that there was clear evidence before the judge that the appellant had approached the Beja Congress UK and Ireland but that, at the time of the previous hearing, they had been unable to produce the evidence that they now did as they were seeking to verify the appellant's political affiliation. Mr Manley relied upon the evidence (somewhat unusually including oral evidence) from the eminent and well-respected country expert, Mr Verney who had spoken to the officials and confirmed that the letters were genuine and attested to the appellant's affiliation to the Beja Congress.

11. In my judgment, there is no answer to Mr Manley's submissions. There was clearly an explanation why the evidence had not previously been available at the earlier hearing. The new evidence could not simply be dismissed on the basis that the judge did not accept that there was no explanation for it not being produced earlier. Added to that, Mr Verney, who is a well-respected and well-known expert in relation to Sudan, authenticated the letters. Their content was relevant both to the appellant's credibility and to the specifics of his account to have suffered persecution as a result of being a member of the Beja Congress and, of course, thereafter to his political involvement in the UK.

12. As Mr Manley pointed out, the rule 24 notice did not seek to argue that if this were an error it was not material. I did not understand Mr Richards in his oral submissions to seek to make that argument either. The evidence was relevant and, potentially, significant in assessing the appellant's asylum claim. The judge's reasons for rejecting it and, perhaps over-rigidly applying Devaseelan and creating "conclusive" findings, together with his failure to properly consider Mr Verney's report amounted to an error of law which was, in my judgment, material to the judge's adverse factual findings.

13. In my judgment, the error taints both the findings in relation to the appellant's claimed account of political involvement in Sudan as well as in relation to his claimed political involvement in the UK.

14. In these circumstances, the judge's decision and adverse findings were flawed and cannot stand. The appeal must be reheard *de novo* including, although the claim may have limited prospect of success, on the basis (if all other factual finding are against the appellant) that he is a failed asylum seeker.

Decision

15. For the above reasons, the decision of the First-tier Tribunal to dismiss the appellant's appeal involved the making of a material error of law. The decision cannot stand and is set aside.

16. Having regard to the nature and extent of fact-finding required, and having regard to para 7.2 of the Senior President's Practice Statement, the proper disposal of this appeal is that it be remitted to the First-tier Tribunal for a *de novo* rehearing before a judge other than Judge O'Brien.

Signed

A Grubb
Judge of the Upper Tribunal

Date: 28 September 2017