



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-005036
First-tier Tribunal No:
PA/02433/2020

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 08 August 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE SHEPHERD

Between

SW (ETHIOPIA)
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Hussein, Fountain Solicitors

For the Respondent: Mr McVeety, Senior Home Office Presenting Officer

Heard at Manchester Civil Justice Centre on 20 July 2023

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, and following the anonymity order made in the First-tier Tribunal, the Appellant is granted anonymity.

No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the Appellant. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

Background

1. This matter concerns an appeal against the Respondent's decision letter of 2 March 2020, refusing the Appellant's asylum and protection claim initially made on 16 April 2018.
2. The Appellant's claim had been made on the basis of his political opinion, claiming to be a member of an opposition party called Patriotic Ginbot (PG7). He said due to his political activities, he had been arrested, detained and tortured in Ethiopia in 2016 and was subsequently released due to his uncle paying a bribe before he fled the country. He also says his father was arrested and killed due to political activity.
3. The Respondent refused the Appellant's claim due to the vagueness of his account, lack of knowledge and failure to remember the timings of his father's arrest/detention; his credibility had also been damaged by failing to claim asylum in France. The Respondent did not accept that the Appellant was a supporter of the political group Ginbot 7 or that he had been arrested or even if it had accepted these things, country information showed the government was no longer persecuting those from the Ginbot 7 political party.
4. The Appellant appealed the refusal decision.
5. His appeal was heard by First-tier Tribunal Judge Mack ("the Judge") at Manchester on 22 August 2022, who later dismissed the appeal in its entirety in a decision promulgated on 25 August 2022.
6. The Appellant applied for permission to appeal to this Tribunal on five grounds as follows:

- (a) Ground 1: refugee claim - failure to apply correct standard of proof.

At several points in the decision such as [61], [64] [47] [75] [77], the Judge finds things 'incredible' and uses the word 'probably' such that she applied a higher, and therefore incorrect, standard of proof when assessing refugee claim on several occasions.

- (b) Ground 2 - inadequate reasoning

At [76] the Judge failed to provide adequate reasoning for finding the arrest warrant not to be genuine. The Appellant had provided the court order for the issue of the arrest warrant and the Judge did not provide adequate reasons for failing to attach weight to this.

- (c) Ground 3 - risk on return

The Judge failed to adequately assess the persecutory risk that the Appellant faces on return as a result of his factual matrix in light of the country guidance presented. Whilst at [84] the Judge finds there are real issues in Ethiopia, she fails to adequately explain why he would not be at real risk as a consequence.

- (d) Ground 4 - sur place

At [82] and [86] the Judge appears to accept the Appellant has had some involvement in political activities in UK, but then fails to address what risk

he would face on return as a result; the Appellant cannot be expected to lie about his activities in order to avoid persecution.

(e) Ground 5 - article 8 ECHR

While the Judge refers to article 8 at [40] she then fails to make any findings in relation to it, despite having noted at [44] the Appellant's skeleton argument which made submissions on the point.

7. Permission to appeal was granted by First-tier Tribunal Judge Hatton on 14 October 2022, stating:

"1. The application is in time.

2. Multiple reasons are advanced as to why the Judge arguably erred in refusing the Appellant's appeal on asylum, humanitarian protection and human rights grounds.

3. In particular, the grounds assert at [5.1] that the Judge erred in failing to assess whether the Appellant's proposed removal to Ethiopia attained the threshold of Article 8 of the ECHR. Correspondingly, I note the Judge's decision conspicuously fails to undertake any consideration of Article 8. Accordingly, I accept it is arguable the Judge erred in failing to undertake such consideration, especially given the grounds' contention at [5.2] that Article 8 was expressly raised in the Appellant's Appeal Skeleton Argument ("ASA"),

4. The grounds further assert at [4.2] that the Judge erred in failing to consider the Appellant's risk on return on account of his sur place activities. Correspondingly, I accept the grounds' contention at [4.1] that the Judge did not dispute the Appellant has supported Ginbot 7 and the Welkait Amhara Restoration Committee ("WARC") whilst in the UK. Whilst I note the Judge characterised said activity as "minor" [82], I am mindful that in accordance with the ratio of *ROBA (AAR) v The Secretary of State for the Home Department (Rev1) (OLF members and sympathisers) Ethiopia (CG) [2022] UKUT 1 (IAC)* at [headnote 4] it is not necessary to establish a very high level of involvement or support, rather, there must be an examination of whether a person will be perceived by the authorities as having an anti-government agenda on account of such support. Given that WARC's *raison d'être* is to annex Welkait by any means, including military action, it is unclear on what basis, if any, the Judge believes that the Appellant's accepted support of said organisation would not lead to him being perceived as having an anti-government agenda, especially because there is no discernible engagement with the ratio of *ROBA* (as articulated at [3.2] of the grounds) notwithstanding the Judge's acknowledgment at [44] of the need to make reference to said case.

5. Permission is granted on all grounds."

The Hearing

8. The matter came before me for hearing on 20 July 2023.

9. It serves no purpose to recite the submissions in full here as they are a matter of record. I shall only set out the main points as follows.

10. A preliminary discussion took place as to what I considered to be a 'Robinson obvious' point which had not been raised in the grounds, being that the Judge found the Appellant not to be credible on any part of his account, despite the Refusal Letter actually finding him credible as regards some aspects. Para 5 of the Refusal Letter said:

“In your witness statement and your asylum interview, you were able to remain consistent in regard to the date you were arrested [AIR 2 Q 203], the place where you were caught and arrested [AIR 2 Q 209], that you were taken to 18 Gondar police station [AIR 2 Q 213] and how long you were detained in that place for [AIR 2 Q 215]. You also remained consistent in explaining on why the police released you [AIR 2 Q 223] and how much your uncle had to pay to have you released [AIR 2 Q 225]. This has gone towards making this aspect of your claim credible.”

11. However, the Judge at [69] says “Overall I found the entire case of the appellant peppered with inconsistency and implausibility” and at [85] that “I have found him to lack credibility and to have fabricated his claim”.
12. Mr Hussein considered this was a concession by the Respondent which had not been withdrawn such that it was an error on the Judge’s part not to have taken it into account.
13. Mr McVeety said the Judge was entitled to proceed as she did; para 5 of the Refusal Letter simply said there were parts the Appellant was credible on which “go towards” credibility; it did not say the Appellant had been found credible; the previous para 4 categorically said he was not found credible on other aspects and the summing up concluded that everything except his nationality had been rejected.
14. Mr Hussein maintained it should have been considered by the Judge nonetheless. As to the remaining grounds, he had little to add as to what was set out therein.
15. In response, Mr McVeety said there was no rule 24 response and all grounds were opposed as follows:
 - (a) Ground 1: the Judge sets out the correct burden of proof at [35], the Judge’s findings themselves are not being challenged, just the words she has used; if a case is not credible then by definition it is ‘incredible’; there is no evidence that the Judge did not follow her self-direction.
 - (b) Ground 2: for this to be a material error, it has to be shown that he Judge’s finding was not open to her but it was, the Judge finds that the arrest document was something which would never have been handed to the Appellant, but was one which the courts would have given to the police to effect the arrest; there was no reason why the Appellant had it and he could not say how he had obtained it; Tanveer Ahmed was correctly applied.
 - (c) Grounds 3-5: He admitted that, having found the Appellant had undertaken some political activity, this could put him at risk and the Judge failed to consider this, however it is a stretch to consider the Appellant is genuine in his beliefs; the Judge said he had done practically nothing except attend a couple of demonstrations and had given no good reason why he hadn’t done anything more. The grant of permission appears to look to authoritative caselaw that he could come to risk, but Roba does not support the Appellant’s case at all as it concerned active supporting members of the OLF, whereas the Appellant’s group no longer exists. Even if it applies, it is hard to see that the Appellant could come within any of the risk categories it sets out. The Judge’s findings were therefore open to her.

- (d) Ground 4: the Appellant's article 8 claim cannot be said to have any distinguishing features beyond his protection claim; obstacles to return were based solely on risk so it is hard to see how the Appellant had a basis for making a freestanding article 8 or private life claim; any failure to address it cannot therefore be material if the risk had already been considered.
16. Mr Hussein responded to say that 276ADE and article 8 should have been considered as they had both been raised in the ASA; it was up to the Judge to determine whether they had been made out.
17. Mr Hussein asked that the appeal be granted and remitted back to the First-tier Tribunal for a de novo hearing. Mr McVeety agreed this was appropriate if ground 1 was made out, otherwise it could be retained in the Upper Tribunal for remaking.

Discussion and Findings

18. Ground 1

19. The Judge's decision at [35] and [50] refers to the correct standard of proof as to the Appellant's protection claim. However, I agree there are indications that the Judge failed to go on to apply this 'lower' standard and instead applied a higher standard when assessing the Appellant's credibility, as follows (my emphasis in bold):

[61] In the round, given the types of replies that are recorded I find it **literally incredible** that the interpreter would make up some replies of the appellant and give part of an answer for others.

[64] However, to say you went to "where someone lived" but to mean "to a bus station" is incredible and I reject it as **wholly implausible**.

[66] It would be **incredible** if the appellant went to a Christening last week, travelling to a city he doesn't know, and was with his friends family, but doesn't remember at all. It is simply not plausible.

[67] I find it **incredible** that the appellant would not have told his friend".

20. Whilst I accept that the word 'incredible' could theoretically be used as an alternative to finding something 'not credible', such use is unwise as 'incredible' can also mean 'impossible' or 'wholly unbelievable'. I consider the Judge did not use it in the sense of 'not credible' given the addition of words such as 'literally' and 'wholly' and given the tone of the decision as a whole is one of scoffing at the Appellant's account. This is particularly prominent in the following passages which contain evidence of sarcasm:

[59] Perhaps he should have read his own ASA...

[62] The appellant has had a remarkable stroke of luck...

[75] I am satisfied that this is a ridiculous incredible reason to give... How better than to get hold of his wife.

[77] I am satisfied that I do not need to be an expert conveyancer in Ethiopia to find it incredible that someone could sell a house for money, get the money and not leave when it is paid.

[86]. I have detailed as to why I consider his sur place activities in the UK astonishingly low key, even on his evidence.”

21. As the Appellant’s account largely turns on credibility, and the Judge’s assessment of credibility has been undertaken using the incorrect standard, this is a material error affecting all of her findings on credibility. For this reason, I disagree with Mr McVeety that any of the findings needs to have been specifically challenged as they are all undermined.
22. The appeal therefore succeeds on this basis but I shall address the remaining grounds briefly for completeness.
23. *Ground 2*
24. At [76] the Judge states:

“In assessing the arrest warrant alongside the evidence, in the round, I am not satisfied that this is a genuine document. The circumstances in which the appellant obtained the document cannot be considered in isolation from his other evidence. His other evidence lacks credibility and plausibility.”
25. It is clear that part of the reason for rejecting the warrant is due to the finding that the Appellant lacks credibility. As above, the basis for that finding is flawed.
26. As to the remaining reasoning, this is set out in [72] to [75], with [73] and [74] correctly referring to the correct applicable caselaw for assessing documents. The Judge appears to find at [75] that the Appellant did not realise he needed to explain how he got the warrant and that the account he then gives is ‘deliberately vague’ and ran counter to his claim not to be in contact with certain family members. She does not accept the Appellant’s lack of contact with his wife in particular. I cannot see that the Judge addresses the court order relied on by the Appellant, beyond setting out each side’s submissions in relation to it at [72] – [73]. I also cannot see that, despite citing Tanveer Ahmed, the Judge considers any factors such as the appearance of the documents, the information contained therein and what, if anything, country evidence has to say about them. Rather the focus is on how the Appellant obtained the arrest warrant itself, and does not engage with the authenticity or otherwise of the court document and what impact that, in turn, had on the warrant.
27. Given that the arrest warrant went to the core of the Appellant’s account as to why he would be at risk on return, and because it cannot be said that the Judge would have reached the same conclusions as to lack of risk if she had found the warrant and/or court order to be genuine, this is a material error.
28. *Ground 3*
29. I do not agree that the Judge fails to adequately explain why the Appellant would not be at real risk, having found at [84] that “there are real issues in Ethiopia”. She finds he would not be at risk because she dismisses his entire account due to a lack of credibility and plausibility. This ground in itself is therefore not made out but I appreciate it again relates back to the flawed assessment of credibility.
30. *Ground 4*

31. Mr McVeety conceded there was an error under this ground but disputed materiality.
32. It is well established that the principles set out in HJ (Iran) v SSHD [2010] UKSC 31 are applicable to cases concerning how someone will behave on return for fear of a convention reason such as the political activity in this case. The questions that must be asked in such cases are found in para 82 of that decision and in this case were as follows:
 - (a) The tribunal must first ask itself whether it is satisfied on the evidence that the applicant holds a political opinion, or that he would be treated as holding it by potential persecutors in his country of nationality.
 - (b) If so, the tribunal must then ask itself whether it is satisfied on the available evidence that people with political opinion who expressed it openly would be liable to persecution in the applicant's country of nationality.
 - (c) If so, the tribunal must go on to consider what the individual applicant would do if he were returned to that country.
 - (d) If the applicant would in fact express it openly and thereby be exposed to a real risk of persecution, then he has a well-founded fear of persecution - even if he could avoid the risk by living "discreetly".
 - (e) If, on the other hand, the tribunal concludes that the applicant would in fact live discreetly and so avoid persecution, it must go on to ask itself why he would do so.
 - (f) If the tribunal concludes that the applicant would choose to live discreetly simply because that was how he himself would wish to live, or because of social pressures.... then his application should be rejected
33. As per the first part of this test, whether or not the Appellant's political beliefs are genuine is somewhat, if not altogether, irrelevant because the test is how he will be perceived on return.
34. Having accepted at [82] and [86] that the Appellant had undertaken sur place activities in the UK (albeit at a very low level), it was incumbent upon the Judge to examine whether he would continue such activities on return and his reasons for doing so or not. Failing to do so was an error.
35. The Judge should also have considered any applicable country guidance caselaw, even if it was only to distinguish it, and this included ROBA (AAR) v The Secretary of State for the Home Department (Rev1) (OLF members and sympathisers) Ethiopia (CG) [2022] UKUT 1 (IAC) which was brought to her attention, as it is referred to in [44].
36. However, given the Judge's findings as to the level of activity in the UK being minor and her rejection of the Appellant's account as regards political activity in Ethiopia, all indications are that her conclusion would have been the same even had she properly considered the applicable caselaw i.e. that the Appellant would not be at risk on return by reason of his political opinion. I disagree that someone who is found not to hold genuine political beliefs could not be expected to lie about their activities on return. Cases such as XX (PJAK - sur place activities - Facebook) Iran CG [2022] UKUT 23 (IAC) and the comments therein about a non-

believer reasonably being expected to delete a Facebook account support this view. Whilst this case applied to Iran and not Ethiopia, its guidance in discussing social media in general terms can be said to apply more widely, just as HJ (Iran) applies more widely. For these reasons, I find the error is not material.

37. *Ground 5*

38. Whilst the Judge refers to the correct standard of proof for human rights claims including article 8 at [40] and also refers to the ASA at [13] [59] and [60] (albeit for other reasons), I cannot see that she addresses either 276ADE of the immigration rules or article 8, both of which had been put in issue by the Refusal Letter and ASA. I do not accept that the Judge did not need to address either or both due to their being predicated wholly on risk; the ASA at para 43 argued that the Appellant has friends and a private life in the UK which he would be unable to continue should he be forced to leave. Even if this argument ultimately had no basis, it needed to be addressed and findings made accordingly. Given it was not addressed in any way, and article 8 in particular was not wholly predicated on risk (with the meeting or not of 276ADE forming part of the article 8 proportionality assessment), it cannot be said with any degree of certainty that the Judge would have found a claim not to have been made out. This is a material error.

39. Overall, I find the errors found infect the decision as a whole such that it cannot stand.

40. Both parties agreed that in these circumstances the appropriate course of action was for the matter to be remitted to the First-tier Tribunal for hearing afresh.

Conclusion

41. I am satisfied the decision of the First-tier Tribunal did involve the making of errors of law.

42. Given that the material errors identified fatally undermine the findings of fact as a whole, I set aside the decision of the Judge and preserve no findings.

43. In the light of the need for extensive judicial fact-finding, I am satisfied that the appropriate course of action is to remit the appeal to the First-tier Tribunal to be heard afresh by a judge other than Judge Mack.

Notice of Decision

44. The decision of the First-tier Tribunal involved the making of an error of law and I set it aside.

45. I remit the appeal to the First-tier Tribunal for a fresh decision on all issues. No findings of fact are preserved.

46. Given the claim concerns issues of protection, an anonymity order is made.

L. Shepherd
Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber
4 August 2023