



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

Appeal Number: AA/03388/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 11 November 2014**

**Decision Promulgated
On 9 December 2014**

Before

UPPER TRIBUNAL JUDGE O'CONNOR

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

J.A.

(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr N Smart, Senior Presenting Officer

For the Respondent: Miss A White, instructed by Messrs J.M. Wilson

DECISION AND REASONS

1. An anonymity direction is made pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, prohibiting the disclosure or publication of documents or information relating to the proceedings or any other matter likely to lead members of the public to be able to identify the claimant or any members of his family.
2. The Secretary of State for the Home Department is the appellant before the Upper Tribunal, and JA is referred to herein as the claimant.

3. The claimant entered the United Kingdom on 27 December 2011 and made an application for asylum on the same date. The Secretary of State did not determine this application until 8 May 2014, on which date it was refused. On the following day the Secretary of State made a decision to remove the claimant from the United Kingdom, a decision against which the claimant brought an appeal before the First-tier Tribunal. First-tier Tribunal Judge Ferguson allowed this appeal on Refugee Convention grounds in a decision of 31 July 2014.
4. The claimant's case before the First-tier Tribunal was in substance that he is a Sudanese national of non-Arab ethnicity and that, as a consequence, he would be at risk of being persecuted if returned to Sudan. The First-tier Tribunal accepted this was so and it is the reasoning underpinning such acceptance that forms the basis of the Secretary of State's challenge before the Upper Tribunal. Permission to bring such challenge was granted by First-tier Tribunal Reid in a decision of 20 August 2014.
5. The Secretary of State's grounds of appeal can be summarised in the following terms:
 - (i) The First-tier Tribunal misdirected itself in law by reversing the burden of proof in relation to the claimant's ethnicity, so as to place such burden on the Secretary of State.
 - (ii) The First-tier Tribunal erred in law in requiring the Secretary of State to put forward a specific alternative to the claimant's assertion as to his ethnicity;
 - (iii) The First-tier Tribunal's conclusion in relation to the claimant's ethnicity is irrational, there being no evidence before the First-tier Tribunal to support its findings.
6. It was accepted by the Secretary of State that the claimant is from Sudan. The issue in dispute before the First-tier Tribunal was whether the claimant is of non-Arab ethnicity.
7. The First-tier Tribunal provided eight paragraphs of reasoning for its conclusion on this issue. The focus of the Secretary of State's first ground relates to the reasoning found in paragraph 26 of the determination¹:

"The respondent does not provide any alternative reason for concluding that [JA] is not a 'non-Arab': the respondent simply relies on the burden of proof being on the appellant and concluding that it is not established that he is non-Arab. It is accurate of course for the appellant to have to prove the facts of his case to the lower standard and if he does not then his claim is not made out. But the fact there is no evidence of a specific alternative proposed by the respondent is a factor to consider when assessing whether [JA] has discharged the burden on him. Part of the reason given by [JA] as to why he is African is his appearance (Q16). This is not disputed by the respondent. Another reason in answer to the same question at interview is

¹ This paragraph being anonymised only for the purposes of the Upper Tribunal's recitation of it.

‘Where we resided, an area in Darfur called Hay-Zabita’. Again this is not disputed by the respondent.”

8. It is said in the grounds, and maintained by Mr Smart before me, that the terms of paragraph 26 are demonstrative of the Tribunal placing the burden of proof on the Secretary of State on the issue of the claimant’s ethnicity. In my conclusion this submission is plainly misconceived.
9. The Tribunal repeatedly directs itself throughout the determination that the claimant bears the burden of proving his case, including his ethnicity (as to which see for example paragraphs 9, 22 [under the heading ‘The Law’], 23, 26, 27, and 32 of the determination). What is said in paragraph 26 of the determination is not a reversal of the burden of proof, but an identification of the fact that although the Secretary of State disputes the claimant’s evidence and although the burden is on the claimant to make out his case that he is not of Arab ethnicity, the Secretary of State does not proffer any alternative to the claimant’s assertions in this regard.
10. The Tribunal was not here requiring the Secretary of State to proffer an alternative, but merely highlighting the fact that no alternative had been proffered. This is an entirely accurate statement of the case as it was put before the First-tier Tribunal and in my conclusion the Tribunal were perfectly entitled to treat the absence of an alternative suggestion by the Secretary of State as to the claimant’s ethnicity as a relevant matter when coming to its conclusions on this issue. I, therefore, reject the assertions made in the Secretary of State’s first two grounds.
11. Turning then to the final ground, i.e. that the Tribunal’s conclusion on the issue of the claimant's ethnicity is irrational given that, on the claimant's own account, he is unable to say with confidence which ethnicity he is.
12. It is said by Mr Smart that the Tribunal reached its conclusion “on no evidence at all”. This though is simply inaccurate. The Tribunal provided the following rationale in its determination for concluding that the claimant had made out his case to the relevant low standard that he is of non-Arab ethnicity;
 - (i) The claimant’s own evidence has consistently been that he is African, although he does not know what tribe he belongs to because of the circumstances in which he grew up, including the death of his parents when he was young [25];
 - (ii) The claimant asserted that he is African in his appearance, a matter which has not been disputed by the Secretary of State [26];
 - (iii) The claimant identifies himself as non-Arab because of the area in Darfur where he resided [26];
 - (iv) The claimant has submitted all the evidence at his disposal including memories of wedding ceremonies connected to his ethnic origin [27];

- (v) Although there were some inconsistencies in the claimant's account of the circumstances which pertained in Sudan, his evidence in this regard is credible and truthful [28 - 32]
13. I find that these are lawfully adequate and sufficient reasons for the conclusion reached by the First-tier Tribunal that the claimant is not of Arab ethnicity. It was not necessary for the purposes of deciding the appeal for the Tribunal to conclude exactly what ethnicity the claimant is, it sufficed that he is not of Arab ethnicity. The Tribunal's conclusion in this regard is not irrational or perverse, given the evidence (including the claimant's own evidence) that was before it. The Secretary of State's third ground amounts, in my conclusion, to no more than a disagreement with the Tribunal's findings and does not disclose an error of law capable of affecting the outcome of the appeal.
14. Given the Tribunal's conclusions as to the claimant's ethnicity, it was plainly open it to allow the appeal following the country guidance decision of AA [2009] UKAIT 00056, which both parties agreed was to be followed.
15. For these reasons I find that the First-tier Tribunal's determination does not disclose an error of law capable of affecting the outcome of the appeal and, consequently, it is to remain standing.

Signed:



Upper Tribunal Judge O'Connor
Date: 26 November 2014