Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/10153/2014

THE IMMIGRATION ACTS

Heard at Newport	**Decision & Reasons Promulgated**
On 21 September 2015	**On 7 October 2015**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

AU
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr J Edwards instructed by Albany Solicitors
For the Respondent: Mr M Divnycz, Home Office Presenting Officer

DECISION AND REMITTAL

1. I make an anonymity order under Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698 as amended) in order to protect the anonymity of the appellant who claims asylum. This order prohibits the disclosure directly or indirectly (including by the parties) of the identity of the appellant. Any disclosure and breach of this order may amount to a contempt of court. This order shall remain in force unless revoked or varied by a Tribunal or court.

Introduction

2. The appellant is a national of Sudan who was born on 1 October 1979. He first arrived in the United Kingdom on 21 May 2003 but thereafter was removed to France on 22 May 2003. He re-entered the United Kingdom on 29 May 2003 and claimed asylum. That claim was rejected and his subsequent appeal to the Asylum and Immigration Tribunal was dismissed on 17 September 2004 by Judge Phillips.

3. On 25 April 2013, the appellant again claimed asylum. The basis of his claim arose from the cessation of South Sudan in 2011 from Sudan. The appellant claimed that his father was from the north and his mother from the south and, as a result of his "mixed heritage", he was at risk on return to Sudan. He also claimed to be at risk because of his *sur place* activities with the Justice and Equality Movement (JEM) in the UK. On 7 November 2014, the Secretary of State refused the appellant's claim for asylum, for humanitarian protection and under the European Convention on Human Rights.

The Appeal

4. The appellant appealed to the First-tier Tribunal. In a determination promulgated on 12 March 2015 the First-tier Tribunal (Judges Page and G Solly) dismissed the appellant's appeal. The First-tier Tribunal did not accept that the appellant had engaged in *sur place* activities in the UK and was at risk on return as a consequence. Further, the First-tier Tribunal concluded that the appellant had failed to establish that he was at real risk on return based upon his "mixed ethnicity" or as a failed asylum seeker.

5. The appellant sought permission to appeal. On 8 April 2015, the First-tier Tribunal (DJ J M Lewis) granted the appellant permission to appeal.

6. On 22 May 2015, the Secretary of State filed a Rule 24 response opposing the appellant's appeal and arguing that the First-tier Tribunal was entitled to find that the appellant was not at risk on return to Sudan.

7. Thus, the appeal came before me.

The Submissions

8. Mr Edwards, on behalf of the appellant relied upon the four grounds of appeal. First, he submitted that the First-tier Tribunal had wrongly relied upon the findings of Judge Phillips in the 2004 appeal in finding that the appellant had failed to establish that he was at risk because of his "mixed heritage". Secondly, in reaching its adverse credibility finding, the First-tier Tribunal had failed to take into account that the appellant's claim now was based on information that he had volunteered in 2003 and 2004 which, at the time, was not a matter which the appellant could foresee would now be relevant and that supported a positive credibility finding in this appeal. Thirdly, Mr Edwards submitted that the FTT had failed to consider all the objective evidence concerning the risk to a person of

"mixed heritage" such as the appellant on return. Fourthly, Mr Edwards submitted that the First-tier Tribunal had been wrong to take into account in applying Judge Phillips findings in 2004 that the appellant had not then (when unrepresented) relied upon any objective evidence.

9. On behalf of the respondent, Mr Divnycz relied upon the Rule 24 notice that the First-tier Tribunal reached a sustainable adverse credibility finding based upon Judge Phillips' decision in 2004. He submitted that there was no error by the First-tier Tribunal in reaching that conclusion in the light of the objective evidence which, the First-tier Tribunal was entitled to conclude, did not establish that the appellant would be at risk because of his "mixed heritage" or as a failed asylum seeker.

Discussion

10. Mr Edwards accepted before me that the First-tier Tribunal's adverse findings in relation to the appellant's *sur place* activity in the UK were not challenged. He relied solely upon the risk to the appellant on return based upon his "mixed ethnicity" and as a failed asylum seeker.

11. In my judgment, the First-tier Tribunal's decision discloses two errors of law.

12. First, in relation to its finding that the appellant would not be at risk on return to Sudan, the Tribunal failed to consider all the background evidence.

13. At para 62, the Tribunal said this:

> "There is no reliable evidence before us in the extant appeal to establish that the appellant would face a real risk on the grounds of his claimed mixed ethnicity. There is no evidence before this Tribunal to meet the low standard of proof to show that the appellant would be at risk upon return by reason of mixed ethnicity, should he be returned in 2015."

14. Then at para 65, having referred to a document from Waging Peace dated 2 March 2015 that failed asylum seekers would be at risk on return to Sudan, the Tribunal stated:

> "There is no country guidance to say that failed asylum seekers cannot be returned to Sudan and in the absence of clear objective evidence of country guidance on the point from the Upper Tribunal, we are unable to conclude that the appellant would be at risk upon return as a failed asylum seeker per se."

15. In its consideration of the background material, the First-tier Tribunal focused on a number of written expert reports by Mr Peter Verney dated 3 November 2011, 12 November 2012 and 26 February 2015. Also, unusually, Mr Verney gave oral evidence before the Tribunal. The Tribunal did not accept that Mr Verney's evidence, based on a single report by

Waging Peace, established that there was a real risk to the appellant on return based upon his "mixed heritage".

16. However, Mr Verney's evidence, although important, was not the only evidence before the Tribunal. There was in addition the *Operational Guidance Note* for Sudan dated August 2012. In s.3.6 "Civilians from South Sudan" that report at paras 3.6.1, 3.6.3 and 3.6.7 describes changes to the nationality law in Sudan in relation to those who are from the south and the removal of citizenship from those who acquire "de jure or de facto" the nationality of South Sudan. It appears from para 3.6.4 of the *OGN* that, under the nationality law of South Sudan a person will be considered a South Sudanese national if any of their parents were born in South Sudan. Potentially, that applies to the appellant if his account were accepted.

17. Further, there is a report written by Bronwen Manby entitled "the right to a nationality and the cessation of South Sudan: a commentary on the impact of the new law, 2012." That document also contains statements concerning the impact of the amendment to the Sudanese nationality law which raises the possibility that a person with one South Sudanese parent will lose their Sudanese nationality (see pages 3, 6 and 7 of the report). The report speaks of the potential risk of statelessness for someone of "mixed ancestry".

18. Mr Edwards indicated in his submission that he had not directly submitted to the First-tier Tribunal that the appellant would loose his Sudanese nationality. However, he submitted that that was implicit in his argument based upon the appellant's "mixed heritage" argument and, indeed, I note that was part of the skeleton argument submitted to the First-tier Tribunal (see paras 12-18 of that document).

19. It may well be because of the emphasis of Mr Edwards' submissions to the First-tier Tribunal that it did not fully engage with the background evidence as to the impact upon the appellant if returned to Sudan. Mr Verney's evidence, taken as a whole, may well have not been sufficient in itself to make good the appellant's claim. But, there was evidence before the First-tier Tribunal which resonated with his claim to be at risk in Sudan because of his claimed "mixed heritage". In reaching its finding that the appellant had not produced any evidence to meet the low standard of proof to show that he was at risk on return by reason of his mixed ethnicity, the First-tier Tribunal fell into error by failing to consider the evidence concerning nationality and, bound up in that, the impact upon him as someone of "mixed heritage" in Sudan.

20. I say no more about the background material as it will be a matter for the First-tier Tribunal on the remittal of this appeal to consider what, if any, risk it establishes to a person who claims/is of "mixed heritage".

21. Neither in the grounds, nor in Mr Edwards' submissions, was any challenge raised to the First-tier Tribunal's finding that the appellant had

not established that he would be at risk on return as a failed asylum seeker *per se*. That finding, therefore, stands.

22. Secondly, however, the issue of risk on return as a person of "mixed heritage" would be of no moment if the First-tier Tribunal had made a sustainable finding that the appellant was not of "mixed heritage". It is not entirely clear to me whether the First-tier Tribunal did, in fact, based upon Judge Phillips' 2004 determination conclude that the appellant had not established he was of "mixed ethnicity". The relevant passage in the determination is in para 62 where the First-tier Tribunal says this:

> "Firstly, we agree with the conclusions reached by Judge Phillips in his determination promulgated on 17 September 2004. He found the appellant to have invented his asylum claim. It would have been surprising if any other conclusion had been reached given the appellant's evidence of having been set up for arrest by his half brother and then escaping dressed as a woman. There is much overlap between what the appellant said then now. His claim then was based upon adverse treatment by his family on the grounds of his mixed ethnicity. There was no objective evidence to enable the appellant to succeed on the grounds of h is objective evidence before Judge Phillips."

23. Para 62 continues thereafter but is solely concerned with whether the evidence before the First-tier Tribunal established an objective risk to those of "mixed ethnicity". It may well be implicit in the words I have set out that the First-tier Tribunal is accepting that Judge Phillips rejected the appellant's claim to be of "mixed ethnicity". Mr Edwards sought to argue that the First-tier Tribunal had misunderstood Judge Phillips' findings in 2004 because, although the background to the appellant's claim then was that he had problems with his step-family because of his mixed heritage, the substance of his claim was that he was at risk because of his political opinion having been accused of distributing political anti-government leaflets. So far as it goes, that submission has some merit. However, Judge Phillips' conclusion in 2004 set out at para 22 of his determination as follows:

> "My conclusion is that this is an appellant who gave a completely false story on arrival in the United Kingdom. He has changed that story and replaced it with a different one but every aspect of the new story is beyond rational belief. The appellant is not a truthful witness, his word cannot be relied upon and I make an adverse credibility finding. In my finding the appellant is not telling the truth about any aspect of his account. I do not believe his account of his problems with his family; I do not believe his account of his arrest, his detention, his escape or his travel to the United Kingdom."

24. That, in my judgment, is a comprehensive rejection of the appellant's account integral to which was that he was put at risk by his step-family who did so because of his mixed heritage.

25. Nevertheless, although with some hesitation, I have concluded that the First-tier Tribunal in this appeal has not properly considered the issue of the appellant's credibility in relation to his claimed mixed heritage. First, there is no clear finding in para 62 of its determination one way or another. Secondly, in any event, a finding on that issue could only properly be made in the light of the background evidence including, for example, problems faced by those of mixed heritage including within families. As the First-tier Tribunal makes plain in para 62, there was no objective evidence before Judge Phillips: it would appear because the appellant did not have the benefit of legal representation. In this appeal, as I have already indicated, I do not consider that the First-tier Tribunal properly considered all the background evidence and therefore, even if para 62 can be interpreted as reaching a clear finding, that finding was made without proper consideration of all the background evidence.

26. Consequently, I am satisfied that the First-tier Tribunal's decision to dismiss the appellant's appeal on asylum grounds involved the making of an error of law. Its adverse credibility finding in relation to the appellant's risk on return (unrelated to any *sur place* activity) cannot stand and neither can its finding (if there be one) that the appellant has failed to establish his "mixed heritage".

27. It will be for the First-tier Tribunal on remittal to make a clear finding on the appellant's mixed heritage and, if established, whether he is at risk on return in the light of the background evidence which has been more fully explored before me than, it would appear, was the case before the First-tier Tribunal.

Decision

28. For these reasons, the decision of the First-tier Tribunal involved the making of an error of law. That decision is set aside.

29. The First-tier Tribunal's finding in relation to the appellant's *sur place* activities and risk arising therefrom is preserved. Otherwise, none of the First-tier Tribunal's findings are preserved.

30. Applying para 7.2 of the Senior President's Practice Statement, bearing in mind the nature and extent of the fact-finding involved and the material to be considered, this is an appropriate case to remit to the First-tier Tribunal to rehear the appeal to the extent indicated in this decision.

31. The appeal is remitted to the First-tier Tribunal to be heard by a judge other than Judge Page or Judge G Solly.

Signed

A Grubb
Judge of the Upper Tribunal