



**Upper Tribunal
(Immigration and Asylum Chamber)
PA/05047/2016**

Appeal Number:

THE IMMIGRATION ACTS

Heard at Field House

On 15 August 2017

**Decision &
Promulgated
On 24 August 2017**

Reasons

Before

**THE HONOURABLE LORD BURNS
(SITTING AS A JUDGE OF THE UPPER TRIBUNAL)
DEPUTY UPPER TRIBUNAL JUDGE FROM**

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MR ABDESSLAM SHEIKHEDDINE ADOUD MARJAN
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr T Melvin, Home Office Presenting Officer

For the Respondent: No representation; no attendance

DECISION AND REASONS ON ERROR OF LAW

1. The appellant is the Secretary of State for the Home Department, who appeals with the permission of the First-tier Tribunal against a decision of Judge of the First-tier Tribunal Adio allowing on Article 3 grounds the appeal of Mr Marjan against her decision to refuse his protection and human rights claims. The Secretary of State's decision was made on 9 May 2016.

2. It is more convenient to refer to the parties as they were before the First-tier Tribunal. We shall therefore refer from now on to Mr Marjan as the appellant and the Secretary of State as the respondent.
3. The First-tier Tribunal declined to make an anonymity direction. No such direction was sought from us and we saw no reason to make one.
4. The background to this appeal is set out in the First-tier Tribunal's decision and the respondent's notice of decision and we shall therefore only set out a concise summary. It is common ground that the appellant is a national of Sudan. On four occasions between September 2011 and May 2012 the appellant claimed asylum in the UK and on each occasion his application was refused on the ground that he should claim asylum in Italy to where he was removed.
5. He next came to the attention of the authorities when he was convicted at Isleworth Crown Court on two counts of robbery and sentenced to a total of six years' imprisonment. The appellant made a further claim for asylum whilst serving his sentence and, after initially indicating he wished to withdraw it, changed his mind. In view of the appellant's conviction, the respondent certified the asylum claim under section 72 of the Nationality, Immigration and Asylum Act 2002.
6. The appellant claimed to be at risk on return to Sudan because he had been a driver for the Justice and Equality Movement ("JEM"). He said he was on a wanted list so he fled to Libya. Although he did not mention it in his interview, the appellant also claimed to have been detained and tortured.
7. The respondent did not believe his account in view of the significant discrepancies contained in it and concluded he would not be at risk on return.
8. Judge Adio heard oral evidence from the appellant, whom he treated as a vulnerable witness in view of a medical report indicating the appellant required in-patient psychiatric assessment and treatment. Judge Adio upheld the section 72 certificate and dismissed the appeal on asylum grounds. In assessing the claim under Article 3, the judge did not consider the appellant's claim other than in relation to his fear of ill-treatment on ethnicity grounds.
9. The judge concluded the appellant had shown on the lower standard of proof that he was a non-Arab Darfuri. He noted that there was no evidence to displace the country guidance given in *AA (Non-Arab Darfuris - relocation) Sudan CG* [2009] UKAIT 00056 and *MM (Darfuris) Sudan CG* [2015] UKUT 00010 (IAC) and allowed the appeal.
10. The respondent's grounds seeking permission to appeal argued Judge Adio had erred in finding the appellant was a non-Arab Darfuri, which had not been conceded in the reasons for refusal letter. The appellant had stated he was from the Al Nuba tribe. Judge Adio had not addressed the

credibility challenge mounted by the respondent and he had not given adequate reasons for his conclusion on the appellant's ethnicity.

11. Permission to appeal was granted because it was arguable that the judge had erred in finding the appellant to be a non-Arab Darfuri when he did not come from Darfur. It was also arguable he had given insufficient reasons for finding the appellant was not of Arab ethnicity.
12. The appellant filed a Rule 25 response opposing the appeal. However, he did not attend the hearing before us. We have received a letter from his former solicitors stating they were no longer receiving instructions from the appellant. In the circumstances, we saw no reason not to proceed with the hearing.
13. We heard submissions from Mr Melvin on the question of whether Judge Adio made a material error of law. We have recorded his arguments in full in our record of the proceedings.
14. Mr Melvin developed the grounds seeking permission to appeal. He made two points. Firstly, Judge Adio failed to make adequate findings on the appellant's ethnicity. Secondly, the judge failed to consider evidence before him that the country guidance should not be followed. Mr Melvin agreed that he only needed to succeed on one of those grounds for the decision to be set aside and we have only found it necessary to consider his first point.
15. Having considered the submissions, we decided to allow the respondent's appeal and to set aside the decision of Judge Adio for the following reasons.
16. We note in detail the judge's reasoning, which is contained in paragraphs 16 and 17 of his decision.
17. In our view, there are a number of deficiencies in this reasoning which vitiate the decision. Firstly, it was incumbent on the judge to make his findings after giving full consideration to the credibility challenge mounted by the respondent. The judge upheld the section 72 certificate (a decision not challenged by the appellant) and treated this as being a full disposal of the claim.
18. The judge then turned his attention to Article 3 on the discrete basis of the appellant's ethnicity without making any findings on the claim put forward by the appellant that he feared ill-treatment by reason of his perceived political opinions. It is trite law that the evidence must be considered in the round and, by adopting this route, the judge left out of account the impact of any adverse credibility finding on the issue of the appellant's ethnicity. That is a serious error in our view.
19. Secondly, we find it difficult to understand on what basis the judge was able to arrive at the conclusion that the appellant was reasonably likely to be perceived to be a non-Arab Darfuri. He does not give reasons for his observation that the appellant is clearly not of Arabic origin.

20. We accept that the issue was one of ethnic origin as opposed to geographical location as explained in *MM*. The appellant has claimed to be a non-Arab. However, the appellant has not, as far as we can see, ever self-identified as a non-Arab Darfuri prior to the hearing in the First-tier Tribunal. In his screening interview dated 20 September 2011 he gave his ethnicity as "African/Arab". He went on to state he was part of the tribe called "Al Nouba from South Kurdofan". On 26 February 2012, he stated his ethnicity was "Nuba Tribe". On 21 July 2015, he gave his ethnicity as "Southern Kurdofan / Nuba Mountains".
21. If this is what the judge had in mind when he stated that the appellant had been consistent about these aspects of his claim, we regard it as a rather flimsy basis for such a conclusion.
22. The judge appears to have treated the absence of any challenge to the appellant's claimed ethnicity in the refusal letter as easing the appellant's path towards a positive finding in this respect. However, it is far from clear to us that the appellant had ever made a claim to be Darfuri. He has not been consistent about where he was born.
23. We note the Al Nuba, which is the tribe the appellant has most consistently said he belongs to, are not on the list of non-Arab tribes shown to the judge at paragraph 9 of *MM*.
24. For these reasons, the appeal is allowed and the decision of Judge Adio set aside.
25. The appeal must be heard de novo by a different Judge of the First-tier Tribunal and we make the following directions to assist with that process:

DIRECTIONS

- (1) The appeal will be heard by any Judge of the First-tier Tribunal except Judge Adio on a date and at a place to be notified;
- (2) The decision of Judge Adio to uphold the section 72 certificate is preserved;
- (3) Findings must be made on the credibility of the appellant's claim to fear ill-treatment on the grounds of both his political opinions and his ethnicity;
- (4) If either party wishes to file additional evidence not previously filed, a consolidated bundle should be prepared containing the fresh evidence and all the evidence previously filed, which bundle must be filed at the Tribunal and served on the other party no later than 14 days before the hearing;

(5) If the respondent intends to argue that existing country guidance on the risk to non-Arab Darfuris (*MM* and *AA*) should not be followed, then cogent evidence to support such arguments must be filed and served no later than 14 days before the hearing;

(6) The appellant must provide proof of his current address. If he wishes to have the appeal transferred from Hatton Cross to a hearing centre nearer to where he currently resides, he must write to the tribunal with a request for a transfer.

Notice of Decision

The appeal is allowed and the First-tier Tribunal's decision is set aside.

No anonymity direction is made.

Signed

Date 18 August 2017

Deputy Upper Tribunal Judge Froom