



**Upper Tribunal
(Immigration and Asylum Chamber)**
PA/02846/2015

Appeal Number:

THE IMMIGRATION ACTS

Heard at Liverpool

On 28th April 2017

**Decision & Reasons
Promulgated
On 2nd June 2017**

Before

Deputy Upper Tribunal Judge Chapman

Between

**Mr NJ
(anonymity order made)**

Appellant

v

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mrs C. Johnrose, counsel instructed by Broudie,
Jackson & Canter

For the Respondent: Mr C. Bates, Home Office Presenting Officer

ERROR OF LAW DECISION AND REASONS

1. The Appellant is a national of Sudan, born on [] 1990. He arrived in the United Kingdom and claimed asylum on 28 July 2015 on the basis that he is of mixed ethnicity from South Kordofan and he fears persecution on this basis, as a non-Arab Darfurian, if returned to

Sudan and on the basis of his imputed political opinion due to the fact that he was arrested and detained in 2012.

2. His asylum application was refused on 3 November 2015 and he appealed against that decision. His appeal came before First tier Tribunal Judge Shergill for hearing on 22 December 2016. In a decision and reasons promulgated on 6 January 2017, he dismissed the appeal, essentially on the basis that he found that the Appellant is not a non-Arab Darfuri and would not be at risk on return to Sudan.

3. The grounds in support of the application for permission to appeal to the Upper Tribunal, which was made in time, assert that the Judge erred materially in law:

(i) in relying on issues in the expert report not raised during the hearing, thus acting in a manner which was procedurally unfair;

(ii) in materially misdirecting himself with regard to the expert report of Peter Verney;

(iii) in failing to make findings on whether the Appellant would be at risk on account of his non-Darfuri ethnicity/race;

(iv) in failing to take account of material evidence in the expert report;

(v) in imposing a requirement of corroboration;

(vi) in placing undue weight on section 8 issues whilst speculating.

4. In a decision dated 9 March 2017, permission to appeal to the Upper Tribunal was granted by Upper Tribunal Judge Coker on the basis that:

“It is of concern that the First tier Tribunal Judge appears to have predicated his assessment of the appellant’s evidence on the fact that he travelled through other countries and that he did not claim asylum in Turkey. Turkey is not a signatory to the Refugee Convention. It is arguable the judge appears to have failed to take account of his duty to assess the evidence as a whole and in the round rather than in specific parts. All of the grounds relied upon by the Appellant are arguable.”

5. The Respondent lodged a rule 24 response dated 27 March 2017 in which she argued that the Judge did consider the evidence as a whole and in the round and deals with the expert report and was entitled to find that on core elements of the claim the expert did not give an opinion.

Hearing

6. At the hearing before me, Mrs Johnrose sought to rely on both the renewed and original grounds of appeal in their totality. She submitted that at [21]-[29] the Judge has taken great issue with the Appellant's claim to asylum in Turkey over the 3 year period he was there and the fact that he had not claimed asylum there, but as identified by UTJ Coker, Turkey is not a signatory to the Convention. In respect of section 8, it is not determinative but can be used in assessment of credibility, however, the Judge has placed significant weight on section 8 issues and from those issues he concludes at [27]-[29] when looking at all the evidence in the round that the Appellant's credibility is damaged *cf.* [28]. She submitted that such great weight placed on section 8 matters renders the decision unsustainable. Mrs Johnrose also drew my attention to [25] and the finding that the Appellant was deliberately vague and that there was no corroborative evidence as to whether he had fled as claimed but in light of the decision in *Kasolo* (13190) such corroboration is not required.

7. In regards to the other findings in the determination, Mrs Johnrose submitted that whilst the Judge at [19] correctly directed himself as to the issues to be determined he has failed to look at the evidence in the round and has materially misdirected himself in that the Judge failed to make any decision as to whether the Appellant would be perceived as non-Arab Darfuri, despite the clarification provided by Peter Verney as to how and why the Appellant would be perceived. Peter Verney distinguishes between Mesiriya Zurag and other Mesiriya, what the Judge refers to as "*so-called Arab tribes*". They are disadvantaged as non-Arabs and at [147] the expert clarifies that there is no contradiction in the Appellant's description and this was significant evidence before the Tribunal.

8. Mrs Johnrose submitted that the Judge has adopted a very unfair approach in respect of the evidence of the expert and in his assessment of the reasons why he is dismissing the appeal, which were not matters raised by the Respondent in the refusal or at the hearing but issues that the Judge has post hearing looked at and expressed his concern *cf.* [30] through to [65] where he concludes he is going to attach very little weight to the report. The Judge has looked at Peter Verney's report and criticized his methodology, but there is no evidence in the decision that Peter Verney accepted the Appellant's claim at face value and the Judge failed to give the Appellant any opportunity at all to address this issue or any concerns he might have about methodology. In any event, this assertion is baseless: see ground 2(a) and [42] and [43] of decision, which are clearly concerned with credibility, whereas the expert is not entitled to consider credibility and if he had done so he would have been criticized for acting *ultra vires*. The Judge's starting point

is the same as the Respondent ie. there is no rejection by the Respondent that the Appellant's mother is Berti and his father is half Berti and half Mesiriya. To criticize the expert for accepting the Appellant's claimed ethnicity shows that the Judge is misunderstanding the position of the Respondent.

9. Mrs Johnrose also sought to challenge the findings of the Judge at [49] where he asserts that the evidence of the expert in relation to the arrest of the Appellant is contrary to the second headnote of *IM & AI CG* [2016] UKUT 00188 (IAC) which distinguishes between those who are arrested and detained for a short period versus those who are at greater risk of serious harm. Mrs Johnrose drew my attention to the fact that the expert was the same in the country guidance case, which did not criticize him and the evidence relied on by the Upper Tribunal in respect of the treatment of those arrested was Peter Verney's evidence, consequently his report cannot be inconsistent with his evidence in the Country Guidance case: there is no evidence of that and it is highly unlikely. The Judge erred in looking at the evidence incorrectly by focusing on the way an individual is treated in detention. In his letter of 19 January 2017 Peter Verney explains that his methodology is the same as that used in the CG cases and this letter was provided with the application for permission to appeal. Mrs Johnrose submitted that it was very important to note that the Judge is utilising his finding that Peter Verney was accepting the Appellant's credibility at face value to place little weight on the report but this was not the case. She submitted that the issue here is not whether the Appellant was arrested or detained but would he be perceived as non-Arab. Even if the expert had taken on face value the account of past persecution, the Respondent had accepted the Appellant is of mixed ethnicity and is a quarter Mesiriya and the Judge's conclusion as to how the Appellant would be treated would not be affected by past persecution. The Judge erred in failing to go on to consider how the Appellant would be perceived once he found that he was a non-Arab.

10. Mr Bates sought to rely upon the Rule 24 response. He accepted that Turkey not a member of the EU, but there is an agreement with Turkey and it is viewed as a safe place where refugees can claim asylum. In addition, there were opportunities to claim asylum in Italy, Greece and France. Whilst at [27] the Judge found that the Appellant's credibility was damaged but found that this was fatally so for reasons give at [28] viz reference to delay issue, incoherence and implausibility and other significant adverse findings. Mr Bates submitted that it was open to the Judge to make the findings he did.

11. In relation to the Peter Verney report, the Judge did not simply dismiss the expert report in its entirety but what the Judge is saying at [38] is that on the particular facts of this case the expert got it

wrong and cannot be expected to be perfect all the time. The expert has not provided a commentary to provide a basis for the Judge to go on to assess the credibility of the account. Mr Bates submitted that the Judge was clearly aware that the expert is well regarded but on the facts of this particular case, whatever the expert has done in the past, there were areas he expected the expert to deal with but he did not. He took me through the Judge's findings on the expert report at [39]-[65] of the decision and submitted that the Judge has given cogent reasons as to why he treated the expert report in the way he did.

12. Mr Bates submitted that the Judge has at [66] onwards specifically dealt with the fact that the Appellant is from a non-Arab Darfuri tribe and that he was not satisfied with the witness evidence put forward and it was open to the Judge to make an adverse credibility finding and to conclude at [69] that he was not satisfied the Appellant would be at risk on account of his skin colour and ethnicity. The Judge further concludes at the end of [69] that no concrete conclusion can be drawn on this basis, absent evidence of linguistic differences. The Judge reached his findings with regard to the sum total of the evidence, including the oral and expert evidence and made no material errors of law in so doing.

13. In her reply, Mrs Johnrose submitted that what is overlooked or omitted is the uniqueness of this particular case *viz* the Appellant's mixed ethnicity in light of the Respondent's acceptance of this aspect of the case. She submitted that the failure to assess the effect of the Appellant's mother's tribe and the concentration on his father's tribe is the key issue, given that it is already accepted that the Berti are from a non-Arab Darfuri tribe, hence the decision to instruct Peter Verney to consider his father's tribe. The Judge has not incorporated into his assessment whether the Appellant is an African or an Arab and this is a fundamental flaw which has not been addressed by the Presenting Officer. It was incumbent on the Judge to look at this. The expert states at [242] that the Appellant is likely to be from Mesiriya as he claims and gives reasons for this *viz* that member of this tribe are easily mistaken for non Arabs and that the Appellant is mixed ethnicity and at [245] the expert makes the point that the Appellant's account is "distinctively individual" but Judge has not taken this into account when determining the appeal.

Decision

14. I found a material error of law in the decision of First tier Tribunal Judge Shergill and announced my decision at the hearing. The parties were content for the appeal to be remitted back to the First tier Tribunal to be heard *de novo*. I now give my reasons.

15. I find that the first ground of appeal is made out in that the

Judge made extensive criticisms of the expert report of Peter Verney, however, at no stage were any of the points raised by the Judge or the Presenting Officer during the hearing in order to give the Appellant's representatives the opportunity to address them, either in the form of submissions or in the form of additional evidence from Mr Verney. I find that this was procedurally unfair

16. I further find that there is merit in the second ground of appeal. Whilst the Judge was not obliged to accept the contents of the expert report and whilst the Judge did provide reasons for rejecting certain of the expert's findings, he appears to have proceeded on an erroneous basis, in that it was accepted by the Respondent that the Appellant is of mixed ethnicity and thus the task of the expert was to consider the risk on return to Sudan in light of that acceptance. I also accept Mrs Johnrose's submission that given that the expert was also the expert in the CG case of *IM & AI* CG [2016] UKUT 00188 (IAC) the Judge erred in finding that his conclusions in respect of this Appellant were inconsistent with his evidence and the findings of the Upper Tribunal in the second headnote in the CG case, which in any event concerned patterns of detention rather than risk of serious harm.

17. In respect of the third ground of appeal, I do not accept Mrs Johnrose's submission that, having concluded (erroneously in light of the expert report) that the Appellant is not a non-Arab Darfuri at [71] the Judge compounded his error by failing to consider whether he would be perceived as such, due to his mixed ethnicity. At [69] and [71] the Judge considered and rejected the contention that the Appellant would be identified as "African" rather than "Arab" due to his skin colour and thus effectively determined this issue.

18. However, I find that there is merit in Ground 4 *viz* that the Judge failed to take properly into consideration the evidence contained in the expert report of Peter Verney, as a consequence of his erroneous treatment of that report, for the reasons set out in the first and second grounds of appeal. This goes, in particular, to the issue of risk on return as a person of mixed ethnicity. Grounds 5 and 6 raise issues that were not determinative of the appeal but for the avoidance of doubt I find that the Judge materially erred in imposing a requirement of corroboration at [25] and in placing undue weight on the failure by the Appellant to claim asylum in third countries at [25] and in finding that there was no plausible reason why the Appellant could not have claimed asylum in Turkey at [23].

19. Moreover, it is apparent from the decision that the Judge considered and rejected the credibility of the Appellant's account prior to his consideration of the expert report of Peter Verney, which is an erroneous approach *cf. Mibanga* [2005] EWCA Civ 367.

20. For the reasons set out above, I find that the First tier Tribunal

Judge erred materially in law and I set aside his decision and reasons. The appeal is remitted back to the First tier Tribunal in Manchester for the appeal to be heard *de novo*. None of the findings of fact are preserved.

Rebecca Chapman

Deputy Upper Tribunal Judge Chapman

31 May 2017