Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/00031/2020
[PA/50394/2020]

THE IMMIGRATION ACTS

Heard at Field House (remotely via MS Teams)	**Decision & Reasons Promulgated**
On: 21 December 2021	**On 14 January 2022**

Before

UPPER TRIBUNAL JUDGE KAMARA

Between

AS
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms M Cohen, counsel instructed by Harrow Law Centre
For the Respondent: Ms A Everett, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is an appeal against the decision of First-tier Tribunal Judge Colvin, dated 23 March 2021. Permission to appeal was granted by Upper Tribunal Judge Plimmer on 2 September 2021.

Anonymity

2. An anonymity direction was made previously and is reiterated below because this is a protection matter concerning an appellant who has been found to be a victim of modern slavery.

Background

3. The appellant arrived in the United Kingdom on 16 August 2018, having left Sudan in May 2016. Prior to arriving in the United Kingdom, the appellant travelled to Libya, Italy, Germany, France and Belgium.

4. The basis of the appellant's asylum claim is that the Sudanese government killed his elder brother and other young men in his village because they suspected them of being part of the opposition. The appellant was not present at the time as he was tending to the farm animals, but he feared the authorities would kill him as well. The appellant left Sudan by truck, having heard that the authorities were asking about him and that they wished to conscript him. The appellant worked as a shepherd in Libya for food and took other work in order to save money to continue his journey. The appellant applied for asylum in Germany but was removed to Italy which was the EU member state responsible for his claim. Thereafter the appellant made his way to the UK.

5. The appellant's protection claim was refused in a decision dated 22 June 2020. The Secretary of State accepted that he was a Sudanese national of Rezeigat ethnicity. The circumstances which the appellant claimed occurred in Sudan were rejected for a want of consistency in several respects. Nonetheless, it was accepted that the appellant's brother had died but as a result of indiscriminate violence in 2016 rather than being targeted. It was not accepted that the appellant would come to the adverse attention of the Sudanese government owing to ethnicity, as he was not a member of a non-Arab Darfuri tribe. The suggestion that the appellant was at risk of forced conscription into the Sudanese army was rejected as mere speculation. The appellant's credibility was considered to be damaged by his failure to seek protection in other safe countries.

The decision of the First-tier Tribunal

6. At the hearing before the First-tier Tribunal, the appellant was treated as a vulnerable witness because a conclusive grounds decision had found that he is a victim of modern slavery. The judge considered that the appellant's brother was killed in crossfire rather than targeted violence. The judge noted that the appellant had never been requested to join the Sudanese security forces and doubted that the Sudanese authorities were asking for the male youths of the appellant's village to report to the police station for this purpose. It was not accepted that there was any evidence to indicate that the appellant, as a conscript, would be required to participate in conduct contrary to basic humanitarian laws.

7. Nor did the judge accept that it was reasonably likely that the appellant would be prosecuted or imprisoned for draft evasion and that if he was imprisoned, it was not reasonably likely to give rise to a breach of Article 3 given the "reported steps being taken to limit the prison population." The appeal was dismissed.

The grounds of appeal

8. The grounds of appeal were threefold. Firstly, there was criticism of the judge's failure to accept the credibility of the parts of the appellant's claim which were not subject to cross-examination by counsel on behalf of the respondent. Secondly, the judge's finding that there was no evidence that the Sudanese authorities were currently involved in conflicts which breached international humanitarian laws was not one which was open to her. Thirdly, the judge had provided inadequate reasons for concluding that the appellant would not face prosecution for draft evasion, that he would fall into the category of prisoners liable to be released and that his imprisonment would not give rise to a breach of Article 3 given the prison conditions in Sudan as well as the appellant's vulnerability as a victim of trafficking.

9. Permission to appeal was granted on the basis sought.

10. In the respondent's Rule 24 response dated 12 October 2021, the appellant's appeal was opposed. On the first ground, it was submitted that counsel for the respondent relied on the issues in the refusal notice and it was for the appellant's counsel to question him about that evidence. Regarding the second ground, it was argued that the judge was entitled to accept the respondent's view that there was a lack of current evidence that members of the Rapid Support Forces (RSF) were committing atrocities. As for the third ground, there was no indication that the appellant had been called up for national service, the judge was aware of the modern slavery issue and as such the judge's conclusions were legally sustainable.

11. In advance of the hearing, a skeleton argument was submitted on the appellant's behalf. Annexed to that document was a witness statement and contemporaneous notes of Mr Jimenez who represented the appellant at the First-tier Tribunal.

The hearing

12. Ms Cohen's submissions were based on her detailed skeleton argument, the accompanying documents as well as reference to the background material. Ms Everett relied on the Rule 24 response drafted by her colleague however she had concerns as to the decision of the First-tier Tribunal in that she saw strength in the arguments advanced on the appellant's behalf. She argued that the judge was entitled to find that there was not enough evidence of conscription in the appellant's area, that the appellant had not been directly approached and did not know if others

in his area were being conscripted. Ms Everett accepted that there were clearly violations of human rights taking place in Sudan as set out in the evidence before the judge. Nonetheless, Ms Everett argued that the issues raised in the grounds were ones with which the judge should have wrestled with more and identified what evidence she was relying on.

13. At the end of the hearing, I indicated that I was satisfied that the errors of law identified in the grounds were made out and that they were material errors. Consequently, I set aside the decision of the First-tier Tribunal with no findings preserved.

Discussion

14. I will address the grounds in order. The first ground stresses the judge's reliance on an alleged inconsistency in the appellant's account. At [16], the judge states that there was "inconsistency in the evidence of what (the appellant's) father told him and when he was told." The judge did not set out what the specific inconsistencies were. While the respondent rightly points to the decision letter as having stated that there were discrepancies regarding this key part of the appellant's account at paragraph 32, the judge does not refer to the said letter. Nor was the appellant cross-examined on the matters of concern to the respondent, that much is clear from the witness statement and notes of the advocate who represented the appellant before the First-tier Tribunal. Furthermore, the appellant addressed the alleged inconsistencies in his witness statement where he commented on the reasons for refusal, which was before the judge however, no account has been taken of his evidence. This is a clear error of law which is material to the question of the political opinion likely to be imputed to him if he were returned to Sudan.

15. The second and third grounds, which concern whether the appellant would face a real risk of forcible recruitment into the Sudanese army and/or whether he was likely to be persecuted as a result of recruitment or refusal to be recruited can be considered together. Nowhere does the judge come to a clear conclusion whether the appellant would be at risk of forcible recruitment on return. Even if it could be said that it was implied that there was no such risk, there is an absence of reasons. Indeed, the evidence before the judge referred to a recent increase in recruitment. The judge further erred in her understanding at [25] that the Sudanese army were not involved in violations of humanitarian law or other atrocities, in the face of ample evidence linking National Intelligence and Support Services (NISS) with numerous human rights abuses, that the RSF were put under the command of the NISS and that when the NISS was replaced by the General Information Service (GIS), former NISS officers worked with the RSF. The evidence before the judge, from a range of sources, was that the RSF had been accused of war crimes and serious human rights violations and that these had not ceased following the ousting of former President Al-Bashir.

16. The judge's conclusion at [25] that the appellant would not face Article 3 ill-treatment if he refused to be conscripted was poorly reasoned, in that the judge stated that he would not be "automatically" prosecuted. This appears to impose a higher standard of proof. The judge, in finding that there was no risk to the appellant, noted that punishments are "very unevenly applied" which is a finding which could be said to benefit the appellant.

17. The judge was referred to evidence which demonstrated that prison conditions in Sudan were inhumane however this was disregarded in favour of a reference in the evidence to some prisoners having been released. If the judge believed that the appellant would benefit from this development, no reasons for this finding were given. It is important to note that the appellant is a victim of modern slavery and thus any assessment of Article 3 risk needs to include reference to the evidence of the appellant as to the effects upon him of this exploitation, which was a point he addressed in his witness statement.

18. Considering the foregoing issues, I am satisfied that the decision of the First-tier Tribunal contained material errors of law which render the decision unsafe.

19. In deciding whether to retain the matter for remaking in the Upper Tribunal, I was mindful of statement 7 of the Senior President's Practice Statements of 10 February 2010 as well as the views of the representatives. Taking into consideration the nature and extent of the findings to be made as well as that the appellant has yet to have an adequate consideration of his protection appeal at the First-tier Tribunal, I reached the conclusion that it would be unfair to deprive him of such consideration.

Decision

The making of the decision of the First-tier Tribunal did involve the making of an error of on a point of law.

The decision of the First-tier Tribunal is set aside with no preserved findings.

The appeal is remitted, de novo, to the First-tier Tribunal to be reheard at Taylor House, with a time estimate of 3 hours by any judge except First-tier Tribunal Judge Colvin.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed: Date: 22 December 2021

Upper Tribunal Judge Kamara