Upper Tier Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/11287/2014

THE IMMIGRATION ACTS

Heard at Manchester	**Decision and Reasons Promulgated**
On 18 December 2015	**On 4 January 2016**

Before

Deputy Upper Tribunal Judge Pickup

Between

M B I
[Anonymity direction made]

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:

For the appellant: Mr J Nicholson, instructed by GMIAU
For the respondent: Mr A McVeety, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, MI, date of birth 1.1.57, is a citizen of Sudan.

2. This is his appeal against the decision of First-tier Tribunal Judge Malik promulgated 13.2.15, dismissing on all grounds his appeal against the decision of the Secretary of State, dated 1.12.14, to refuse his asylum, humanitarian protection and human rights claims, and to remove him from the UK. The Judge heard the appeal on 29.1.15.

3. First-tier Tribunal Judge Robertson refused permission to appeal on 11.3.15. However, when the application was renewed to the Upper Tribunal, Upper Tribunal Judge Canavan granted permission to appeal on 3.6.15.

4. Thus the matter came before me on 18.12.15 as an appeal in the Upper Tribunal.

Error of Law

5. For the reasons set out herein, I find that there was an error of law in the making of the decision of the First-tier Tribunal such that the determination of Judge Malik should be set aside.

6. The grounds of appeal seek to challenge some of the credibility findings of the First-tier Tribunal Judge, on the basis that the judge failed to take into account matters that were material to a proper assessment of the credibility of the appellant's account.

7. In granting permission to appeal, Judge Canavan considered it at least arguable that the judge may have placed too much emphasis on the plausibility of various aspects of the evidence, some of which were not on the face of it inherently implausible. "For example, the finding in relation to the relatively short delay of two weeks before an arrest warrant was issued [60] was made without reference to any background evidence as to what the procedures might be in Sudan. The Tribunal should be cautious not to place undue weight on plausibility in coming to adverse credibility findings: see HK v SSHD [2006] EWCA Civ 037 and Y v SSHD [2006] EWCA CIv 1223."

8. For the most part I am not satisfied that these and similar criticisms made of the decision of the First-tier Tribunal in the grounds and reflected in the grant of permission are well-founded. Judge Malik clearly made a careful and detailed assessment of all of the evidence and the reasons are cogently reasoned. I do not accept that the judge placed too much emphasis on the plausibility of various aspects of the appellant's account. The various inconsistencies and discrepancies highlighted by the judge were open to the Tribunal. As noted by Judge Robertson in refusing permission to appeal by the First-tier Tribunal, the appellant did not claim that corrupt officials facilitated his escape from detention; rather it was due to lax security. It was open to the judge to find against the appellant in the context of inconsistencies and discrepancies between his evidence and that of his witnesses, as set out at §55-64 of the decision. Other than the matter set out below, I find that the findings were open to the judge and this part of the grounds does no more than disagree with the conclusions reached.

9. At §55 of the decision Judge Malik was satisfied that the appellant was a member of the UNP, a registered opposition political party, with some 2 million members. At §59 the judge did not accept that had been extensively involved in a senior position in the party, as claimed. However, at §68 the judge repeated that it was accepted that he was a party member and that he may very well have had some involvement in party activities. "I also accept, as a member of an opposition party, this may have caused him to come to the attention of the authorities and to be questioned by them." The judge found, however, that this would not meet the threshold required to engage

article 2 and 3, but found that his account of having been detained and tortured was not credible.

10. The difficulty is that the OGN for Sudan at section 3.11.16, which appears at A63 in the appellant's bundle, states "Members of opposition groups and perceived government critics, including students, journalists and human rights defenders are subjected to harassment, intimidation, arbitrary arrest, incommunicado detention, and are at risk of ill-treatment and persecution. Each case should be considered on its individual merits, but claimants who fall into this category and can show that they have come to the adverse attention of the authorities, or are reasonably likely to do so, are likely to qualify for asylum."

11. It does not appear that Judge Malik took account of this background material, which Mr McVeety confirms is still current.

12. At §3 of the grant of permission Judge Canavan noted, "The appellant gave a detailed account of his political activities in Sudan, which was broadly supported by the evidence produced in support of the appeal. Whilst the judge noted some discrepancies between the appellant's evidence and that given by other witnesses the appellant provided explanations for those discrepancies. The discrepancies, taken alone, were only likely to undermine one of the claimed detentions but not necessarily the other two periods of detention. The judge accepted that the appellant was an active member of the UNP [55] but at no pint does he appear to assess the credibility of the account in light of the background evidence relating to Sudan, which indicates that political opponents can be subject to detention without charge and may be at risk of serious ill-treatment if detained."

13. Unfortunately this criticism is well-founded and it does appear that the judge failed to take into account matters that were highly material to a proper assessment of the overall credibility of the appellant's account and the risk on return.

14. Despite the otherwise careful and detailed assessment of the evidence, I am satisfied that the judge erred in part of the assessment of the evidence and the credibility of the appellant in failing to consider the risk on return of serious ill-treatment, in the light of the acceptance that he is a party member and may well have come to the adverse attention of the authorities. The credibility of the account was not considered in the light of the OGN, as Mr McVeety accepts, and I thus find that the risk of ill-treatment was not adequately addressed.

15. In the circumstances, this amounts to such error of law that the decision must be regarded as flawed and cannot stand.

16. When a decision of the First-tier Tribunal has been set aside, section 12(2) of the Tribunals, Courts and Enforcement Act 2007 requires either that the case is remitted to the First-tier Tribunal with directions, or it must be remade by the Upper Tribunal. The scheme of the Tribunals Court and Enforcement Act 2007 does not assign the function of primary fact finding to the Upper Tribunal. Where the facts are unclear on a crucial issue at the heart of an appeal, as they are in this case, effectively there has not been a valid determination of those issues.

17. In all the circumstances, at the invitation and request of both parties to relist this appeal for a fresh hearing in the First-tier Tribunal, I do so, on the basis that this is a case which falls squarely within the Senior President's Practice Statement at paragraph 7.2. The effect of the error has been to deprive the appellant of a fair hearing and that the nature or extent of any judicial fact finding which is necessary for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2 to deal with cases fairly and justly, including with the avoidance of delay, I find that it is appropriate to remit this appeal to the First-tier Tribunal to determine the appeal afresh, with no findings preserved.

Conclusions:

18. For the reasons set out above, I find that the making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that the decision should be set aside.

I set aside the decision.

I remit the decision in the appeal to be remade in the First-tier Tribunal.

Signed

Deputy Upper Tribunal Judge Pickup

Consequential Directions

19. The appeal is to be relisted in the First-tier Tribunal at Manchester, with a time estimate of 4 hours;

20. No findings of fact are preserved and the appeal is to be heard afresh;

21. The appeal may be listed before any First-tier Tribunal Judge except Judge Malik;

22. An interpreter in Arabic will be required. The appellant's representative is to confirm in writing the need for an interpreter, as well as the language and dialect;

23. The appellant must serve not later than 14 days before the relisted appeal a single, paginated and indexed bundle of all subjective and objective material relied on, together with any skeleton argument. The Tribunal is unlikely to accept any late served material or skeleton argument.

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order. Given the circumstances, I consider it appropriate to make anonymity order.

Fee Award **Note: this is not part of the determination.**

In the light of my decision, I have considered whether to make a fee award. I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: No fee is payable in this case and thus there can be no fee award.

Signed

Deputy Upper Tribunal Judge Pickup