Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/00486/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 10 May 2017	**On 24 May 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE RAMSHAW

Between

MR M A A
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms R Moffatt of Counsel
For the Respondent: Ms A Fijiwala, a Senior Home Office Presenting Officer

DECISION AND REASONS

1. Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original Appellant. This direction applies to, amongst others, all parties. Any failure

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to comply with this direction could give rise to contempt of court proceedings.

2. The appellant is a national of Egypt. His date of birth is [ ] 1997. The appellant arrived in the United Kingdom on 18 June 2014 and claimed asylum. The respondent refused the appellant's asylum claim on 22 March 2016. The appellant appealed against the respondent's decision to the First-tier Tribunal.

The Appeal Before the First-tier Tribunal

3. In a decision promulgated on 19 December 2016 First-tier Tribunal Judge NMK Lawrence dismissed the appellant's appeal. The First-tier Tribunal Judge rejected the appellant's claim in its entirety finding that the appellant was not a credible witness. The appeal was dismissed under Articles 2, 3, 5 and 6 of the European Convention on Human Rights. The appeal was also dismissed under Article 8. The basis of the appellant's claim was that he feared persecution from the family of a neighbour.

4. The appellant applied for permission to appeal against the First-tier Tribunal's decision. The grounds of appeal in essence argue that the judge failed to take account of relevant evidence and made a material mistake of fact. It is also asserted that the judge failed to give proper reasons in support of the credibility assessment, failed to take into account that the appellant was a minor when he claimed asylum and failed to consider the case under Article 3 ECHR. On 29 March 2017 First-tier Tribunal Judge Ford granted the appellant permission to appeal.

The Hearing before the Upper Tribunal

Submissions

5. The grounds of appeal as amplified by Ms Moffatt at the hearing are essentially separated into four grounds, however, there is a degree of overlap. Ground 1 asserts that the judge made a material mistake of fact which infected the entirety of the credibility assessment. The central reason given by the judge for finding the appellant's account to be incredible was that it is inherently implausible that the appellant does not know where his father and sister are and that he has not been in touch with them since leaving Egypt. It is asserted that the judge erred in finding that the appellant is from Cairo. Reference is made to the appellant's witness statement which describes his home area as a small traditional village and that his home was made of mud and traditional materials. He explained in his witness statement that his father was a farmer and that he is illiterate and that he never went to school in Egypt. Ms Moffatt referred me to the expert's report at page 45 of the appellant's bundle where the expert describes the appellant's home as a small village in the Nile Delta. It is argued that the judge's finding that the appellant is not concerned about his family's welfare fails to take into account the appellant's evidence. In his witness statement the appellant set out that

he has trouble sleeping because he suffers from flashbacks about what happened in Egypt and that he gets very stressed when he thinks about the incidents. The judge fails to take this into account when concluding that the appellant has not shown concern for his family. It is asserted that in drawing adverse inferences from the appellant's inability to contact his family the judge failed to take into account the appellant's statement that he would like the Home Office to attempt to contact his father. The Home Office has made no attempt to seek to trace the appellant's family despite an obligation upon them to do so. The judge has not addressed the core of the appellant's account focusing instead on peripheral matters.

6. Ground 2 asserts that the judge has failed to give proper reasons for reaching conclusions on credibility. The judge does not give any reasons or explain how the visit from the appellant's father and sister three days after the incident demonstrates that the appellant was not concerned about his sister or that it was unlikely that she was raped. The findings insufficiently reasons and fails to give adequate anxious scrutiny to the appellant's claim.

7. Ground 3 sets out that the judge failed to take into account that the appellant was a minor when he claimed asylum when assessing his credibility.

8. Ground 4 argues that the judge had failed to consider the case under Article 3 of the European Convention on Human Rights. It was submitted by Ms Moffatt that the judge did not discuss the objective evidence, including an expert's report that was submitted with regard to Article 3.

9. There was no appeal against the First-tier Tribunal decision on Article 8.

10. Ms Fijiwala submitted that the judge was correct to find that the appellant came from Cairo. She referred to paragraph 1.14 of the appellant's screening interview where the appellant stated that he was from Shintaina, Al Monofia, Cairo. She submitted therefore that the appellant came from a part of Cairo and that the judge set out that the appellant did not hail from the remotest outback of Egypt. She submitted that at question 1.11 the appellant indicated that he went to the local mosque school so it was incorrect to say that the appellant had never been to school. The judge was entitled to consider that even if the appellant lived in a village there would be an expectation that there would be a telephone service. She submitted that the point that the judge was making with regard to the lack of contact was that the appellant himself had made no effort at all to contact his family. He had not, for example, approached the Red Cross. The appellant did not give any reasons as to why he had not contacted them and therefore the judge was entitled to conclude that this was not credible or that this did not demonstrate any concern for his sister or father. It has not been made clear why the appellant had not contacted the Red Cross if he wanted to make contact with his family. She referred to the Home Office guidance on family tracing and indicated that the obligation ceases when a child turns 18 and the appellant is now over 18.

She referred to paragraph 73 of the case of **TN and MA (Afghanistan) (Appellants) v Secretary of State for the Home Department [2015] UKSC 40**. She submitted that it is clear from **TN and MA** that there can be no presumption that the appellant's account is credible where the Home Office has not undertaken tracing of the family. The judge had considered all the evidence before concluding that the appellant's account was not credible. With regard to Ground 2 she referred to paragraph 17 of the First-tier decision and submitted that the judge was considering that the appellant had done nothing for three days after what he alleged to be a serious incident when his sister and father had to visit him. She submitted that the judge simply does not believe the appellant's account. With regard to Ground 4 Article 3 the ECHR she submitted that the judge had considered this but as the judge did not accept the appellant's account no issues under Article 3 would arise.

11. In reply Ms Moffatt submitted that with regard to where the appellant had stated he came from in his second witness statement he explained that Monofia is a city but he lived in a small village outside the city area. She submitted that it was never an issue that the appellant came from a small village in the region, that there was no cross-examination on this issue either. Therefore the appellant has not had an opportunity to respond to the judge's concerns which are set out only in the decision. She submitted that the appellant had indicated that when at the mosque school all he did was recite the Quran which does not involve literacy. Again there was no cross-examination with regard to the appellant's level of literacy. With regard to the adverse inferences that the judge had drawn because the appellant did nothing for three days after the incident as submitted by Ms Fijiwala she asserted that if that is what the judge says in that paragraph then as the appellant on his account had killed somebody and had been told to stay where he was because he was in danger then it cannot be held against him that he did not attempt to contact his sister or father and it cannot be inferred that he was not concerned.

Discussion

12. With regard to the assertion that the judge erred in finding that the appellant came from Cairo the judge set out:

> "14. The appellant claims he does not have the telephone number of his father or sister. This is not credible. This is the 21st century and mobile phone technology is widespread. The appellant does not hail from the remotest outback of Egypt. He comes from the city of Cairo. I do not find it credible that hailing from such a city neither his father nor his sister have no access to a mobile phone. This does not accord with reality."

13. The appellant has never asserted that he came from the city of Cairo. I do not accept Ms Fijiwala's submission that the judge made a distinction between the remotest outback of Egypt and the small village that the appellant asserted that he lived in. It is clear that the judge considered that the appellant came from the city of Cairo itself. This error goes to the heart of the judge's findings regarding the credibility of the appellant. This

links to the judge's findings with regard to the appellant's lack of attempts to contact his family. At paragraph 15 the judge set out:

> "15. ... It is reasonable to expect him to make every effort, either by letter or telephonic or other electronic means of contacting his sister and father. The appellant's evidence is that he has not made any effort to trace them. I find the appellant claims he has not made any attempts to ascertain his sister's welfare or her whereabouts does not ring true.
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> 16. ... He was born on 1st May 1997. He was 16 when he claims he left Egypt. Familiarity with the usage of the phone, landline or mobile, or letter writing is not beyond the experience of a 16 year old boy."

14. It is clear from the above extracts that the judge had not accepted that the appellant was illiterate and no reasons have been given as to why that was not accepted. Further, it is clear that the judge expected a level of familiarity with modern forms of communication that may or may not have been accessible in a small village in Egypt. The appellant had described his home as made of mud and wood and that it contained shelter for both the family and animals. No objective evidence as to the availability of modern technology was available in the bundle of evidence and no questions had been put to the appellant as to what level of modern communications were available in the village.

15. The judge also appears to have drawn adverse inferences from the appellant's evidence that his father and sister visited him three days after the alleged rape. The judge found at paragraph 17:

> "17. The second matter which renders the appellant's claim implausible is that his father and sister visited him three days after the alleged rape. The evidence before the Tribunal does not demonstrate the appellant was concerned for her safety or welfare. This is contra-indicative of rape."

16. There is no reasoning in this paragraph, or elsewhere in the decision, to explain how the judge arrived at this conclusion. As Ms Moffatt submitted there was a perfectly plausible explanation which is that the appellant on his account had murdered the perpetrator of the rape against his sister and had been taken by his father to a place of safety and told that he was in danger and that he must stay there. In those circumstances it is unlikely that an inference could be drawn that the appellant was not concerned for his sister's safety or welfare. In the absence of any reasoning to support this finding it is difficult for the appellant to understand why the judge has made an adverse finding.

17. With regard to the grounds in relation to Article 3 as the judge had not found any of the appellant's claim to be credible there was no need for the judge to consider in any detail Article 3. However as accepted by Ms Moffatt that would be an issue only if there were a material error of law in the First-tier Tribunal's decision.

18. I find that there was a material error of law in the First-tier Tribunal's decision. The judge has proceeded on the basis that the appellant comes

from a modern city in which modern methods of communication, the use of technology and the use of mobile phones would be widespread and commonplace. I cannot see any evidence before the First-tier Tribunal as to whether or not such technological advances exist in small villages in Egypt. It was never put to the appellant that he came from the city of Cairo. His evidence was consistent that he came from a small village. That was also supported by the expert's evidence. Although there were other findings made by the judge on credibility this was not a minor element of the judge's assessment of credibility. This finding seems to be part of the core as the reasons why the judge found the appellant not to be a credible witness and his account to be inherently implausible. I need not address in any detail the other aspects of the grounds of appeal as it is clear that the findings of the judge cannot be extricated from each other.

19. The First-tier Tribunal decision contained a material error of law in respect of the asylum/protection claim. I set that decision aside pursuant to section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007 ('TCEA'). There was no appeal against the findings in relation to Article 8. That part of the decision therefore stands.

20. I considered whether or not I could re-make the decision myself. I considered the Practice Statement concerning transfer of proceedings. I am satisfied that the nature and extent of judicial fact finding that is necessary in order for the decision in the appeal to be re-made is such, having regard to the overriding objective, that it is appropriate to remit the matter to the First-tier Tribunal.

21. This case is to be remitted to the First-tier Tribunal for a de novo hearing on the asylum/protection claim before a judge other than Judge NMK Lawrence to be heard at Hatton Cross on the next available date.

Signed P M Ramshaw Date 23 May 2017

Deputy Upper Tribunal Judge Ramshaw