



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: DA/00743/2013

THE IMMIGRATION ACTS

Heard at Bradford

On 15 July 2014

Determination

Promulgated

On 8 August 2014

Before

UPPER TRIBUNAL JUDGE CLIVE LANE

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MUNIR SALEH MAHMOOD

Respondent

Representation:

For the Appellant: Mr M Diwnycz, Senior Home Office Presenting Officer

For the Respondent: Not present or represented

DETERMINATION AND REASONS

1. I shall refer to Munir Saleh Mahmood, the respondent, as “the appellant” and the Secretary of State for the Home Department as the “respondent”.

2. I refer to my determination dated 21 November 2013 in which I found that the First-tier Tribunal determination contained an error of law such that it fell to be set aside:

The respondent, Munir Saleh Mahmood, was born on 1 March 1984 and claims to be a male citizen of Sudan. The appellant appealed to the First-tier Tribunal (Judge De Haney and Mr G H Getlevog) against the decision of the respondent dated 17 January 2013 to refuse to revoke a deportation order made under Section 5(2) of the Immigration Act 1971. The First-tier Tribunal, in a determination promulgated on 14 June 2013, allowed the appeal on asylum/Article 3 ECHR grounds. The appellant now appeals to the Upper Tribunal. For the remainder of this determination, I shall refer to Munir Saleh Mahmood as the appellant (as he was before the First-tier Tribunal) and to the Secretary of State as the respondent.

The appellant claims to be of Zaghawa ethnicity. At [44] the Tribunal concluded that the appellant is a Zaghawa from Darfur, Sudan. The Tribunal noted at [10] that both parties to the appeal agree that, if the appellant is a Zaghawa from Darfur, he is entitled to refugee status.

Mr Nicholson, for the appellant, confirmed that there was no cross appeal against the dismissal by the First-tier Tribunal of the appellant's appeal under Article 8 ECHR. At [39], the Tribunal had written that, "given the appellant's criminal conviction and his poor immigration history, we consider it to be entirely proportionate that the interference with the appellant's private and family life is proportionate when given the respondent's obligations to maintain fair and effective immigration control and maintain the economic wellbeing of the United Kingdom". The index offence in this instance was the appellant's conviction at Liverpool Crown Court in January 2006 for the offence of seeking leave to remain in the United Kingdom by means of deception for which he was sentenced to twelve months' imprisonment and recommended for deportation. In the circumstances, I do not intend to revisit the Article 8 ECHR decision.

The Expert Report: Dr Bekalo

The grounds of appeal challenge the reliance placed by the First-tier Tribunal upon the expert report of Dr Bekalo. At [40-41], the Tribunal wrote this:

We have very carefully considered the expert's report of Dr Bekalo. We note the shortcomings referred to by Mr Regan [the Home Office Presenting Officer]. We note that in respect of the scarring the doctor does not say it is exclusive to the Zaghawa tribe. We also note that the expert has accepted at face value the appellant's word that he speaks Zaghawa. The entire interview was conducted in or through an Arabic interpreter and would expect Arab Darfuris to be able to speak Arabic.

Whereas we feel there are some shortcomings in the expert's report we nevertheless have to give weight to this report and give the expert's opinion greater weight than we give to the findings of the Adjudicator in 2004. The Adjudicator in 2004 found the appellant not to be credible and that was the reasoning behind the finding that he was not of the Zaghawa.

It is not clear to me why the Tribunal considered that it was obliged to give greater weight to the expert's report, notwithstanding its shortcomings, than it

gave to the findings of the Adjudicator in 2004. At [41], the Tribunal appears to be stating some point of law or principle but quite what it is has not made clear. The respondent had expressed serious concerns regarding this appellant's credibility including his claim to be a member of the Zaghawa tribe. Those concerns were known to the Tribunal since they had before them the determination of Judge [Adjudicator] Hemingway from 2004. The Tribunal accepted at [18] that the starting point for its own findings as to credibility should have been that determination, following the principles set out in *Devaseelan* [2004] UKAIT 000282. The Tribunal also noted that the appellant had previously used multiple identities. However, the Tribunal does not appear to have applied the principles of *Devaseelan* in its analysis of the evidence. Instead, there is the rather cryptic remark which I have quoted above which suggests that the Tribunal felt obliged to give greater weight to an unsatisfactory expert report than to the unchallenged findings of fact of a previous Tribunal.

The Appellant's Three Witnesses: Messrs Mahmood, Adam and Saleh

At [6], the Tribunal recorded that:

Mr Nicholson sought to adduce the handwritten statements which he had drafted this morning of three witnesses [Messrs Mahmood, Adam and Saleh]. Mr Nicholson apologised that no statements had been lodged in line with directions and he had only been able to take brief statements this morning.

The Presenting Officer before the Tribunal applied for an adjournment but that was refused. The Tribunal noted that the respondent had been "put on notice about the first two witnesses by the appellant's representatives". The Presenting Officer accepted that "the third witness appeared to add little to the first witness's statement". Refusing the adjournment and allowing the witnesses to give oral evidence, the Tribunal wrote that, "we also accepted that we would hear evidence from the third witness but, given the fact the respondents had not been put on notice about the third witness, his evidence would be given the appropriate weight in all the circumstances" [9]. The evidence of the witnesses was thereafter recorded. At [42], the Tribunal indicated that it had "taken account of the witnesses whom today told us that the appellant was of the Zaghawa tribe and that he is from Darfur (*sic*)". The Tribunal acknowledged that there were "some little discrepancies" between the evidence given by the witnesses and the appellant. At [43], the Tribunal concluded that, "what we do have before us are three people as well as the appellant who state with some certainty that the appellant is of the Zaghawa and that he is from Darfur" and at [44] that, "given the expert's report and the three witnesses, we do not find that we could reasonably come to any other conclusion but that the appellant is a Zaghawa from Darfur. We come to this conclusion despite the lack of credibility of the appellant and other aspects of his claim, his previous appeals and immigration history".

As I noted above, the Tribunal had admitted the evidence of the third witness (it is not clear exactly who they mean but I assume that it was Mr Bakhet Adam) but clearly indicated that, since the respondent had not been given the opportunity of making any checks regarding the witness, they would give his evidence only the "appropriate weight in all the circumstances". At no point in the passages which I have quoted above has the Tribunal indicated what that "appropriate weight" might be and how it may differ from the weight given to the evidence of

the other two witnesses; the evidence of each of the three witnesses and the expert appears to have been given equal weight. There was no proper analysis of the probative value of the evidence of either the witnesses or the expert but instead a rather grudging acknowledgement that the Tribunal had no alternative but to find that the appellant was, as he claimed, a Zaghawa. I find that the Tribunal's analysis of the evidence raises more questions than it actually answers. In particular, the method of analysis appears to have been influenced by considerations which have not been properly clarified in the determination. Any reader of the determination would be left in doubt as to the reasoning behind its conclusion. Consequently, I find that the Tribunal's determination is flawed by errors of law which require it to be set aside. The decision will be remade in the Upper Tribunal following a resumed hearing. None of the findings of fact of the Tribunal shall stand save that in relation to Article 8 ECHR which the Upper Tribunal will not revisit.

DECISION

The determination of the First-tier Tribunal dated 14 June 2013 is set aside. None of the findings of fact (save in relation to the appeal on Article 8 ECHR grounds) shall stand. The Upper Tribunal shall remake the decision following a resumed hearing on a date to be fixed.

3. At the resumed hearing on 15 July 2014, Mr Diwnycz appeared for the respondent. On 12 June 2014, Mr Diwnycz had written to the Tribunal in the following terms:

Those files requested have arrived at the POU [Presenting Officers' Unit] ... colleagues (in my absence) and I scrutinised them for the information and corroboration they might have contained. On the basis of what has been provided to and accepted by the Home Office historically, I am content to vacate the scheduled hearing arranged for 15 July.

4. I refer to [8] of my error of law determination. Mr Diwnycz told me that the Home Office did not seek to challenge the evidence given by the witnesses, Messrs Mahmood, Adam and Saleh; "the various files" referred to in Mr Diwnycz's letter concern those witnesses. In the light of this evidence, the Secretary of State accepts the appellant is a member of the Zaghawa tribe and, as such, has a well-founded fear of persecution and/or Article 8 ECHR ill-treatment should he be returned to his country of origin. As a consequence, the appellant is entitled to refugee status. The appeal is allowed on asylum and human rights (Articles 2/3) grounds.

DECISION

5. This appeal is allowed on asylum grounds.
6. This appeal is allowed on human rights grounds (Articles 2/3 ECHR).
7. This appellant is not entitled to a grant of humanitarian protection.

Signed

Date 8 August 2014

Upper Tribunal Judge Clive Lane