



Upper Tier Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/29288/2014

THE IMMIGRATION ACTS

Heard at Field House
On 13 July 2015

Decision and Reasons Promulgated
On 14 July 2015

Before

Deputy Upper Tribunal Judge Pickup

Between

Secretary of State for the Home Department

Appellant

and

Zamichael Tesfagergish
[No anonymity direction made]

Claimant

Representation:

For the claimant: Ms V Laughton, instructed by Wilsons Solicitors
For the respondent: Mr E Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The claimant, Zamichael Tesfagergish, date of birth 10.9.81, is a citizen of Eritrea.
2. This is the appeal of the Secretary of State against the decision of First-tier Tribunal Judge Nichols promulgated 6.3.15, allowing the claimant's appeal against the decision of the Secretary of State, dated 14.7.14, to remove him from the UK to Italy, where he has been recognised as a refugee. The appellant appealed against that decision on human rights grounds. The Judge heard the appeal on 6.3.15.

3. First-tier Tribunal Judge Robertson granted permission to appeal on 12.5.15.
4. Thus the matter came before me on 13.7.15 as an appeal in the Upper Tribunal.

Error of Law

5. In the first instance I have to determine whether or not there was an error of law in the making of the decision of the First-tier Tribunal such that the determination of Judge Nichols should be set aside.
6. The lengthy grounds of appeal submit that in allowing the appellant's appeal on article 3 EHCR grounds, on the basis that he would not receive adequate support and assistance if returned to Italy, where he is a recognised refugee, the judge erred in law. First, in failing to engage with the decisions of the European Court of Human Rights as to the method of assessing whether there had in fact been failures in Italy. Second, it is submitted that this resulted in a failure to make findings of relevant issues, such as whether the appellant reported ill-treatment to the police, or sought medical treatment, or applied for assistance.
7. In granting permission to appeal Judge Robertson considered that all grounds are arguable.
8. I have taken account of Ms Laughton's Rule 24 response, dated 4.6.15.
9. Mr Tufan accepts that at §19 the judge correctly set out the relevant test, namely whether it had been shown by the evidence that the proposed removal of the claimant to Italy demonstrated a real risk that he would suffer treatment contrary to article 3 ECHR. At §4 of the grounds it is submitted that the correct legal approach is that in Hussein and others v The Netherlands & Italy 2775/10 - Admissibility Decision [2013] ECHR 1341: "Whether taken from a material physical or psychological perspective, disclose a sufficiently real and imminent risk of hardship severe enough to fall within the scope of Article 3." It appears to me that this is essentially the same test/approach.
10. Ms Laughton complains that the Secretary of State is relying on Hussein, which was a decision on admissibility, to the exclusion of other more recent authority, including those referred to by the First-tier Tribunal Judge, including EM (Eritrea) [2014] UKSC 12, and the decision of the Grand Chamber of Tarakhel v Switzerland (29217/12), a decision issued on 4.11.14. Mr Tufan responded by pointing out that Tarakhel involved a family including 6 children where there were particular vulnerabilities, and thus the conclusion that the return of that family to Italy would be in breach of article 3 unless the Swiss authorities first obtained individual guarantees from the Italian authorities that the family would be kept together and the children dealt with in a way appropriate to their age. Regard has to be had to the particular vulnerabilities of the individuals concerned.
11. Mr Tufan relied on the recent Judicial Review application case of R (on the application of Weldegaber) v SSHD (Dublin Returns - Italy) IJR [2015] UKUT 70 (IAC), in which the President reviewed the various case authorities and held that in

Tarakhel the European Court of Human Rights was not purporting to promulgate a general rule or principle that a sending state is required to secure specific assurances from the destination state as to accommodation or the like. The President stated that the conclusion in Tarakhel is inextricably bound up with its highly fact sensitive context. Further, the President was unable to conclude that even if accommodation were not immediately available to the appellant for a limited period it would be sufficient to overcome the article 3 threshold of a serious risk that he would be exposed to inhuman or degrading treatment. There has to be a presumption that Italy will comply with its international obligations.

12. There are a number of cases cited by Mr Tufan and §11 of the grounds, including Hussein, in which it has been held that whilst the general situation and living conditions of asylum seekers and accepted refugees in Italy may disclose some shortcomings, it has not been shown to disclose a systemic failure to provide support. None of these cases were referred to by the First-tier Tribunal.
13. However, it is clear from the case law referred to by both sides that essentially there has to be a fact-finding exercise by the judge, considering not only the general situation on the ground in the country of proposed destination but also the claimant's circumstances, including his or her previous experience.
14. I am satisfied that the judge carefully considered the background evidence including reports. However, it is not entirely clear to me that the report from an attorney in Rome on the Italian system of international protection can properly be described as an expert report, though relied on by the First-tier Tribunal Judge at §25. The judge did, however, cite thereafter a number of reports suggesting deficiencies in the Italian asylum system, which were taken into account.
15. I find that the difficulty with the decision is in relation to the ground of appeal that the judge failed to make findings on relevant issues. The judge did set out the appellant's claimed history between §6 and §14 of the decision. However, the findings of fact at §28 are rather limited, stating, "I find that the appellant has shown a real likelihood that he lived on the streets in Italy for up to 2 years, depending on charities for food, unable to find accommodation or employment and subject to abuse and, on one occasion, physical assault. I find the appellant to be a credible witness in respect of those matters. I also find that he is a person with some vulnerabilities because of the medical situation in the report... which set out the various marks and injuries which the appellant suffered prior to his arrival in Italy and concluded that he has suffered psychological consequences from his traumatic experiences."
16. It is not so much that the judge failed to make findings of fact, but that the evidence before the judge was demonstrably insufficient to demonstrate that the claimant met the article 3 threshold of risk. As set out at §11 of the decision, the claimant stated that in Italy he was not ill and did not need to see a doctor. He had been granted refugee status and issued with the 'soggiorno' residence permit, but had not been given a travel document or identity card which it is claimed he would require to access medical care. But he had neither required nor tested the need for medical

treatment, and there is insufficient evidence to suggest that he would be unable to do so, if needed. A theoretical acceptance by the judge that he would now need medical treatment because of injuries and stress occasioned before arriving in Italy, is a far cry from finding that because of this issue the claimant's circumstances the article 3 threshold is met.

17. Similarly, although the claimant asserted that on one occasion he and another Eritrean had been abused and assaulted, he did not report it to the police, because he believed nothing could be done about it, feeling that he could not approach the authorities because they knew perfectly well the situation in which he and other refugees were living. The reality is that he was as much entitled to protection of the police against assault as an Italian national. That he decided not to seek such protection cannot, on that ground, amount to a real risk that he would suffer treatment in breach of article 3.
18. The claimant's account is that he was obliged to leave a refugee camp, because his asylum claim had been accepted, and told to make his own arrangements for accommodation. He relied on churches for food and water and went to Catania where he was able to access overnight accommodation, but could not find work and spent his days doing nothing. He could not obtain work, partly because of language problems and partly because of the absence of work opportunities. The judge has made no finding that his failure to obtain work was attributable to the Italian authorities' breach of article 3, rather than the general economic difficulties faced by the population at large, compounded by his inability to speak Italian.
19. Rather than remaining in Catania, he went to Rome and found temporary work washing cars. He found accommodation in a squat, but slept on the streets during the summer. In summarising the appellant's evidence the First-tier Tribunal Judge does not state that the claimant was refused assistance from the authorities and makes no findings as to whether the appellant made any enquiries for assistance when in Rome. In fact the evidence does not demonstrate that the claimant ever sought refugee assistance from the authorities after leaving Catania. The claimant believes that if he returned to Italy he was sure that he would have to go back on the streets, without any support, but the evidence on which to conclude that is so is absent from the decision of the First-tier Tribunal.
20. In summary, I find merit in the complaint of the grounds that the judge has failed to properly consider and take into account whether the claimant ever sought assistance in finding work or accommodation, either within the scope of special public or private social assistance schemes for refugees or other vulnerable persons. Having accepted the claimant's evidence as credible, it does not necessarily follow that his fears as to what his situation would be on return are well-founded. As explained above, much of his evidence demonstrates that he apparently did not seek assistance or protection. I bear in mind that it is not for me to supplant the judge's proper assessment of the evidence and findings of fact just because I or another judge may have reached a different conclusion on the evidence. However, the findings and conclusions have to be reasoned and open to the judge on that evidence. I am not satisfied that they were. In the circumstances, I find that the judge has failed to

provide cogent reasons for concluding that the claimant's evidence can properly demonstrate a real risk of hardship severe enough to fall within article 3, and thus that the decision must be set aside.

21. 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 and conclusions to be drawn therefrom 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. I further note that in this case it is likely that substantial further evidence will be adduced. Ms Laughton stated her intention to call live evidence from a country expert in Italy, possibly by video link.
22. In all the circumstances, and at the invitation of Ms Laughton 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.

Conclusions:

23. 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 remaking of the decision to be heard in the First-tier Tribunal.



Signed

Deputy Upper Tribunal Judge Pickup

Consequential Directions

24. The appeal is remitted to the First-tier Tribunal at Taylor House, on a date to fixed, with an estimate of four hours;
25. The claimant's representatives should be consulted as to available dates for representatives and witnesses to attend;
26. The claimant's representatives should prepare a revised, comprehensive, indexed and paginated single bundle of relevant subjective and objective material upon which the claimant intends to rely;

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 pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

Given the circumstances, I make no 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 (rule 23A (costs) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007).

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: The outcome of the appeal remains to be decided.



Signed

Deputy Upper Tribunal Judge Pickup