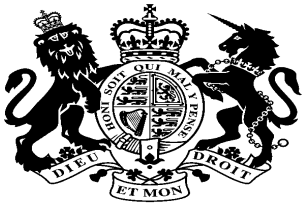

Upper Tribunal
(Immigration and Asylum Chamber)

AM (fair hearing) Sudan [2015] UKUT 00656 (IAC)

THE IMMIGRATION ACTS

Heard at Field House, London	**Decision promulgated**
on 27 October 2015	……

Before
The Hon. Mr Justice McCloskey, President
Upper Tribunal Judge Canavan

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

AM

Respondent

ANONYMITY

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI2008/269) we make an Anonymity Order. Unless the Upper Tribunal or Court orders otherwise, no report of any proceedings or any form of publication thereof shall directly or indirectly identify the original Appellant. This prohibition applies to, amongst others, all parties.

Representation

Appellant: Mr T Wilding, Senior Home Office Presenting Officer
Respondent: Mr M Mohzam, of Counsel, instructed by Burton and Burton Solicitors

(i) Independent judicial research is inappropriate. It is not for the judge to assemble evidence. Rather, it is the duty of the judge to decide each case on the basis of the evidence presented by the parties, duly infused, where appropriate, by the doctrine of judicial notice.

(ii) *If a judge is cognisant of something conceivably material which does not form part of either party's case, this must be brought to the attention of the parties at the earliest possible stage, which duty could in principle extend beyond the hearing date.*

(iii) *Judges are entitled to form provisional views in advance of a hearing provided that an open mind is conscientiously maintained.*

(iv) *Footnotes to decisions of the Secretary of State are an integral part of the decision and, hence, may legitimately be considered and accessed by Tribunals.*

(v) *Fairness may require a Tribunal to canvas an issue which has not been ventilated by the parties or their representatives, in fulfilment of each party's right to a fair hearing.*

DECISION AND REASONS

Introduction

1. This is an asylum case in which the Secretary of State for the Home Department (the "*Secretary of State*"), is the Appellant. The Respondent is a national of Sudan, aged 26 years. By her decision dated 01 April 2015 the Secretary of State refused the Respondent's application for asylum. The Respondent's ensuing appeal to the First-tier Tribunal (the "*FtT*") succeeded. The appeal was allowed on both asylum and Article 3 ECHR grounds.

This Appeal

2. The grant of permission to appeal to this Tribunal recognises the arguability of the Secretary of State's grounds of appeal, which can be linked to three separate passages in the FtT's decision. These are, in turn:

   (a) First, in [21], the Judge, having recorded the Secretary of State's view, expressed in the decision letter, that the Respondent's claim to be a member of a particular tribe, with an associated risk of persecution, was inconsistent with Home Office information, stated:

   > "*I found this paragraph to be somewhat confused and unhelpful. I accessed the background information relied on by the Secretary of State as set out in the footnotes to the refusal letter.*"

   The Judge then rehearsed the outcome of his internet researches, continuing:

   > "*The claimed inconsistency is not clarified by the decision maker and I do not wish to speculate on what it might be save that the Appellant's evidence is that he is both Shukriya and a non-Arab.*"

   The consequential ground upon which permission to appeal has been granted entails a complaint that the Judge failed to disclose to the parties that he had engaged in this research.

(b) In [24] – [26] of the decision, the Judge addressed certain discrepancies in the Respondent's asylum claim as assessed on behalf of the Secretary of State. These related to a clash between local residents, including the Respondent, with a powerful Sheikh, a member of the Sudanese Government, stimulated by a local humanitarian crisis caused by a flooding river and the importuning of the Sheikh for help. The Respondent's case was that his participation in these events precipitated his detention and torture by the police. In the decision letter, the Secretary of State fastened onto a *prima facie* discrepancy in responses given by the Respondent relating to dates. The Judge recorded the Respondent's explanation in both his witness statement and evidence, which was that an interpreter's error had occurred. The Judge made a finding, in [24], that the Respondent had not received an audio recording of his interview. In [25] he made a further finding, accepting the Respondent's evidence, that he had not claimed to have been arrested on a particular date. In [26], the Judge reiterated his finding that the reference to the last mentioned date arose from a misinterpretation of the Respondent's responses during interview, stating:

> "*There does appear to be some inconsistency but given that I am satisfied that* [the controversial date] *was misinterpreted I am not satisfied that this inconsistency fatally undermines the Appellant's credibility. There has been a very high level of consistency in his account overall.*"

The grant of permission to appeal, with specific reference to these passages, states:

> "….. *The Judge appeared to have formed a view on the core elements of the Appellant's asylum claim regarding the Appellant's arrests and detention before hearing oral evidence from the Appellant* [see 24 – 26] *or submissions from the parties' representatives.*"

It is necessary to juxtapose this with the relevant passage in the grounds of appeal, which states:

> "*It is submitted that the FtT Judge has erred procedurally in forming a view on core elements of the Appellant's claim in advance of the hearing … without hearing oral evidence from the Appellant or indeed submissions from either the party representing the Appellant and Respondent* [sic]."

This is followed by:

> "*It is submitted that this materially effects* [sic] *any subsequent assessment of credibility and the entirety of the findings thereafter at [50] – [59].*"

(c) The third element of the grant of permission to appeal focuses on [31] of the decision of the FtT. This is linked to [16] of the Secretary of State's decision letter, which states in material part:

> "*You have claimed to have been arrested a second time, after acquiring plastic bags to use for flood defences. You were accused of attempting to monopolise the sugar market ….*
>
> *You have submitted no evidence in support ….*
>
> *Whilst it is accepted that Sudan has in place* [an anti-competition/monopoly law]*, it is not accepted that possession of plastic bags is evidence of an attempt to monopolise the sugar market ….*
>
> *This material fact remains unsubstantiated and therefore is neither accepted nor rejects, but will be considered under Immigration Rule 339L.*"

In [31], the Judge stated:

> "*The Appellant is not claiming that action was being taken against him as an individual by the State under this legislation whether legitimately or otherwise. I can see no indication in the background evidence quoted to show that the legislation is aimed at individuals rather than public bodies, corporations and/or governments. In any event it would appear that the legislation referred to has not been ratified and there is no evidence to show that even if it has it can be used to prosecute individuals who are thought to be rigging the market.*"

The ground of appeal to which this passage gives rise is couched thus:

> "*…. The Judge failed to inform the parties ……. that he had concerns about the background materials relied upon by the Respondent …* [and] *…. to give the Respondent an opportunity to address such concerns at the hearing.*"

General

3. We shall examine each of the grounds in turn. Before doing so, it is appropriate to observe, as we did in our *ex tempore* decision at the conclusion of the hearing, that permission to appeal should not have been granted in this case. The Secretary of State's grounds were based, in large measure, on the contention that the FtT had made a series of findings in advance of the hearing. This was nothing more than bare, unsubstantiated assertion. Mr Wilding, on behalf of the Secretary of State, did not dissent from this analysis. This contaminates both the grounds of appeal and the grant of permission in large measure. Second, as we shall explain in further detail *infra*, the assertion in the grounds of appeal that the FtT "*engaged in pre-hearing research*", without more, was misleading. This too should have been clear to the permission Judge.

The independent judicial research ground

4. An increasingly familiar feature of decisions in the fields of immigration and asylum is the inclusion of footnotes with links to websites. There were nine of these in the Secretary of State's decision in the present case. This phenomenon will be quickly recognised by both judges and practitioners. The FtT Judge did not engage in some

kind of independent research exercise. Rather, as stated unequivocally in [21] of the decision:

> "*I accessed the background information relied on by the Secretary of State as set out in the footnotes to the refusal letter.*"

This was an entirely legitimate exercise, since the Secretary of State was relying on the source materials identified in the footnotes and, further, the latter contained the outworkings of the précis in the text of the decision. This was distorted and misrepresented by the language used in the grounds of appeal, namely "*pre-hearing research*". It is likely that the permission Judge was misled in consequence. This is unacceptable.

The predisposition ground

5. We have addressed this in [3] above. It has no vestige of merit or substance.

The non-disclosure ground

6. This qualifies for the same analysis as the ground addressed in [3] above. In short, in the decision letter, the Secretary of State relied on a measure of Sudanese legislation which was specifically mentioned in the refusal letter and upon which reliance was placed in rejecting the Respondent's asylum application. This part of the letter was structured by the components of a précis, a footnote and a link to a website. The Judge's finding was simplicity itself:

> "*I do not regard this material as being relevant as it is assumed by the Secretary of State. The Appellant is not claiming that action was being taken against him as an individual by the State under this legislation whether legitimately or otherwise.*"

Two conclusions are appropriate. First, applying the relevant legal standards, this finding is unassailable. Second, the taxonomy of "*non-disclosure*" by the Judge is wholly inappropriate. To this we add the observation that the Judge's finding on this discrete issue was, duly analysed, more favourable to the Secretary of State than the Respondent.

Conclusion

7. We would emphasise that, fundamentally, each of the grounds of appeal is, properly, to be viewed and evaluated through the prism of each party's inalienable right to a fair hearing. Bearing in mind the context of this appeal, it is appropriate to formulate some general rules, or principles. It is important to emphasise that these are general in nature, given the unavoidable contextual and fact sensitive nature of every case.

   (i) Independent judicial research is inappropriate. It is not for the judge to assemble evidence. Rather, it is the duty of the judge to decide each case on the basis of the evidence presented by the parties, duly infused, where appropriate, by the doctrine of judicial notice.

(ii) If a judge is cognisant of certain evidence which does not form part of either party's case, for example as a result of having adjudicated in another case or cases, or having been alerted to something in the news media, the judge must proactively bring this evidence to the attention of the parties at the earliest possible stage, unless satisfied that it has no conceivable bearing on any of the issues to be decided. If the matter is borderline, disclosure should be made. This duty may extend beyond the date of hearing, in certain contexts.

(iii) The assiduous judge who has invested time and effort in reading all of the documentary materials in advance of the hearing is entitled to form provisional views. Provided that such views are provisional only and the judge conscientiously maintains an open mind, no unfairness arises.

(iv) Footnotes to decisions of the Secretary of State are an integral part of the decision and, hence, may legitimately be considered and accessed by Tribunals.

(v) If a judge has concerns or reservations about the evidence adduced by either party which have not been ventilated by the parties or their representatives, these may require to be ventilated in fulfilment of the "*audi alteram partem*" duty, namely the obligation to ensure that each party has a reasonable opportunity to put its case fully. This duty may extend beyond the date of hearing, in certain contexts. In this respect, the decision in Secretary for the Home Department v Maheshwaran [2002] EWCA Civ 173, at [3] – [5] especially, on which the Secretary of State relied in argument, does not purport to be either prescriptive or exhaustive of the requirements of a procedurally fair hearing. Furthermore, it contains no acknowledgement of the public law dimension and the absence of any *lis inter-partes.*

DECISION

8. We dismiss the appeal of the Secretary of State and affirm the decision of the FtT.

THE HON. MR JUSTICE MCCLOSKEY
PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Dated: 27 October 2015