Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/07993/2016

THE IMMIGRATION ACTS

Heard at Newport	**Decision & Reasons Promulgated**
On 13 November 2017	**On 23 November 2017**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

S I I A
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms A Evans, Duncan Lewis Solicitors
For the Respondent: Mr I Richards, Senior Home Office Presenting Officer

DECISION AND REASONS

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) I make an anonymity order prohibiting the disclosure or publication of any matter likely to lead to members of the public identifying the appellant. A failure to comply with this direction could lead to Contempt of Court proceedings.

Background

2. The appellant is a citizen of Sudan who was arrested on 3 June 2012 in the UK having been found concealed in the back of a lorry. He claimed asylum. Investigation demonstrated that the appellant had been fingerprinted in Italy in August 2011 and had previously claimed asylum there. As a result, it was decided that he should be returned to Italy under the Dublin II Regulations. A formal request was made of the Italian authorities to accept responsibility for his asylum claim. No response having been received, on 6 July 2012 it was deemed that they had accepted responsibility which was subsequently acknowledged by the Italian authorities. As a consequence, the appellant's asylum claim was certified on safe third-country grounds. Removal directions were set to Italy for 26 July 2012 but were subsequently cancelled.

3. On 2 August 2012, the respondent refused the appellant's claim under Art 3 of the ECHR and certified the claim as clearly unfounded. Removal directions were then set for 16 August 2012 but were cancelled as a result of a judicial review application being filed. The appellant was granted temporary release on 14 August 2012.

4. On 12 November 2015, the Secretary of State further considered the appellant's claim under Arts 3 and 8 of the ECHR based upon his removal to Italy. His claim was refused and again certified. The appellant was detained on 22 March 2016 and removal directions set for 12 April 2016. These were again cancelled after a further judicial review claim was filed. The respondent then withdrew the certification of the appellant's human rights claim conferring, as a result, an in-country right of appeal.

5. The appellant appealed to the First-tier Tribunal. Judge Barcello dismissed the appellant's appeal under Arts 3 and 8 of the ECHR. He found that the appellant's removal to Italy did not breach his human rights.

6. The appellant sought permission to appeal to the Upper Tribunal which was granted by the First-tier Tribunal (Judge Scott-Baker) on 21 June 2017.

7. On 10 July 2017, the Secretary of State filed a rule 24 notice seeking to uphold the First-tier Tribunal's decision.

The Hearing

8. At the hearing, Mr Richards, who represented the Secretary of State confirmed that the Secretary of State had now decided to determine substantively the appellant's asylum claim. An interview was, he told me, scheduled. Both representatives acknowledged, therefore, that the appellant would no longer be subject to removal to Italy under the Dublin II Regulations. Both representatives acknowledged that this appeal was academic in the sense that even if unsuccessful in this appeal, the appellant would not be removed to Italy. However, Ms Evans, who represented the appellant, indicated that the appellant was concerned that the adverse credibility findings made by Judge Barcello (if unsuccessfully challenged before the Upper Tribunal) might affect the

consideration of the appellant's asylum claim by the Secretary of State. Mr Richards maintained the Secretary of State's position that the decision of Judge Barcello was sustainable and should stand.

9. Despite the appeal, therefore, being entirely academic as to whether the appellant can lawfully be removed to Italy, in the light of the parties' positions I see no option but to determine whether Judge Barcello's decision should stand.

Discussion

10. Ms Evans' submissions, relying upon the grounds of appeal, focused upon the judge's adverse findings against the appellant and in respect of a supporting witness (Mr S) in concluding that the appellant could be removed to Italy without breaching Arts 3 or 8 of the ECHR.

11. Ms Evans submitted that the judge was wrong in law to make adverse credibility findings in the circumstances of the appeal. She pointed out that the respondent was not represented at the hearing. Further, the respondent's decision letter did not call into question the credibility of the appellant or Mr S. The appeal hearing had proceeded on the basis that credibility would not be an issue. She highlighted the fact that that had been stated as the expected premise in her skeleton argument. The appellant, because he suffered from learning disabilities and was vulnerable, had not given evidence before the judge. Also, the judge had indicated that he did not wish to hear evidence from Mr S as he had "read the statement and would not have any questions for him". Ms Evans submitted that, in the light of this, to make adverse credibility findings against the appellant and Mr S without raising the matter at the hearing was unfair and in breach of the Surendran guidelines (appended to MNM v SSHD [2000] INLR 576). Ms Evans submitted that the judge's approach was material to his assessment of the evidence as he specifically referred to his concerns about credibility at paras 21 and 22 of his determination.

12. In addition, Ms Evans submitted that in doubting the credibility of both the appellant and Mr S, the judge failed properly to have regard to the appellant's learning difficulties and wrongly stated that there was no evidence to support that he had a "deficiency in his memory". There was such evidence and she referred me to page 39 of the bundle where AGP stated that: "He has significant problems with retaining information".

13. Finally, Ms Evans submitted that the judge had been wrong to infer inconsistencies and reach an adverse credibility finding on the basis of the appellant's screening interview which the appellant's representative had not had time to deal with. The interview had only been sent by the respondent on the Thursday before the appeal was heard on the following Monday. Because of the appellant's learning disabilities, it was impossible to take instructions from him by telephone even with the aid of an interpreter. As a consequence, there was no reference to the issues ultimately relied upon by the judge arising out of the screening interview

in the appellant's statement and, of course, he did not give evidence before the judge because of his vulnerability.

14. On behalf of the respondent, Mr Richards submitted that there was no material error of law. He submitted that the judge had clearly been aware of the appellant's vulnerable status and made specific reference to it in para 12 of his determination and was aware of his medical condition in paras 22 and 23. Mr Richards submitted that the judge was entitled to accept that the appellant's and Mr S' evidence was exaggerated. He was entitled, Mr Richards submitted, to reach his own view on the evidence. Further, in any event, the credibility findings had no impact upon the judge's overall decision and therefore any errors were not material. He submitted that there was no reference in the judge's conclusion to the adverse credibility finding he had made. He submitted that the judge found, in effect, that there was no reason why Mr S could not accompany the appellant to Italy and, thereby, overcome any risk to him and breach of his human rights as a vulnerable person in Italy.

15. In substance, I accept Ms Evans' submissions. It is clear to me that the Secretary of State in her decision letter did not challenge the credibility of the appellant or of Mr S. The Secretary of State was not represented before the judge and so could not be said to have departed from that position. It was the starting position before the judge at the hearing. It was specifically referred to as a premise in the skeleton argument of the appellant's representative. So far as I can see, the judge never suggested otherwise. Indeed, his approach to whether Mr S should give evidence is more consistent with a view that his credibility was not in issue than that it was.

16. Of course, a judge is entitled, in appropriate circumstances, to raise matters of credibility even if the Secretary of State does not, including when the Secretary of State is not represented. Fairness, however, requires that if a judge has any concern in relation to evidence and the credibility of a witness (including the appellant himself) then he should raise those concerns with the appellant's representative. That is reflected in guideline 5 of the Surendran guidelines which is in the following terms:

> "Where no matters of credibility are raised in the letter of refusal but, from a reading of the papers, the [judge] himself considers there are matters of credibility arising therefrom, he should similarly point these matters out to the representative and ask that they be dealt with, either in examination of the appellant or in submissions."

17. It is clear to me that the judge did approach the evidence of the appellant and Mr S on the basis that he doubted their credibility. In para 21, when he is dealing with Mr S' evidence as to the implication for the appellant if he is returned to Italy, the judge stated:

> "I have serious concerns about the credibility of the evidence of both the Appellant and his cousin [namely, Mr S]."

18. Likewise, in para 22 he stated that he approached Mr S':

> "assessment of the Appellant's capabilities with great caution given my concerns as to his credibility."

19. I do not accept Mr Richards' submission that the judge assessed the evidence and the risk to the appellant of returning to Italy and credibility was immaterial to his findings. That is, with respect, impossible to reconcile with what the judge says at paras 21 and 22. The impact upon the appellant included the impact upon him due to his claimed epilepsy, learning difficulties and cerebral palsy. Mr S was familiar with the appellant and his evidence concerning the impact upon the appellant of return was found by the judge, given his "serious concerns" about Mr S' credibility, as evidence which "sought to exaggerate their circumstances in Italy so as to enhance their claims to remain in the UK."

20. Despite the judge's reference to the professional evidence, the adverse credibility finding was material to his ultimate conclusion. The appellant, or more accurately his representatives, had no clue that the judge would take a number of points against the appellant and Mr S to doubt their credibility. It had not been raised prior to the hearing and was not raised at the hearing. This was, in my judgment, in itself, unfair and the judge's findings are accordingly flawed and cannot stand.

21. But, in addition, I also accept Ms Evans' submission that the judge in para 21 was wrong to say that there was no evidence that, due to his learning difficulties, the appellant had a "deficiency in his memory". The GP's letter did support that. The respondent's refusal letter did not doubt the appellant suffered from learning difficulties. At para 26, the Secretary of State accepted that:

> "Your client suffers from epilepsy and severe learning difficulties. He also has other health-medical issues including cerebral palsy for which he has been clinically diagnosed. Your client requires assistance with day-to-day activities like cooking. He also requires help when he is out and about as he has no sense of danger and needs guidance when crossing the road. Your client has been heavily reliant on his cousin who has provided this care for him on (*sic*) route to the UK and since their arrival."

22. Having summarised this paragraph in para 22 of his judgment, the judge went on to doubt Mr S' assessment of the appellant's capabilities because of his concerns about his credibility. Mr S' assessment of the appellant's capabilities was unchallenged by the respondent and the appellant's representatives were not put on notice at the hearing that his assessment was not accepted.

23. Further, I see considerable force in Ms Evans' submission that the judge failed to take into account the appellant's vulnerabilities, in particular his learning difficulties, in assessing the evidence. I accept, as Mr Richards submitted, that the judge refers to the appellant's "claimed vulnerabilities" in para 12 but that was in the context of the conduct of the hearing. Whilst also the judge referred to the appellant's conditions, he appears to do so in a conditional sense referring to them as "claimed" (see para 12) and "potential" (see para 22). Whilst there was not then

(although there is now) a formal diagnosis, there was the supporting letter from the GP and the respondent in para 36 of the refusal letter did not dispute the appellant's conditions. The issues raised, in particular in relation to the screening interview and the appellant's account of his journey to the UK relied upon in para 21, give me serious cause for concern that the judge did not properly factor in the appellant's vulnerabilities. Ms Evans placed reliance upon the fact that the screening interview had only been disclosed to the appellant's representatives shortly before the hearing and at a time when it was not possible to take proper instructions upon it in order to include any explanation in the appellant's witness statement: it always being remembered that the appellant was not fit to give oral evidence. That was a matter which, of course, the appellant's representatives could have raised with the judge. It may be that they should have done so but, of course, again since any discrepancies were not issues raised by the respondent, the appellant's representatives were 'in the dark' and had no reason to expect the judge to take the points that he did to doubt both the credibility of the appellant and Mr S.

24. The importance of having due regard to the vulnerabilities of an appellant both in the conduct of the hearing and in the assessment of his evidence has recently been authoritatively stated by the Court of Appeal in AM (Afghanistan) v SSHD [2017] EWCA Civ 1123. This decision postdated the hearing before the judge and, in large measure, reinforces the long-recognised need for caution and care both in the conduct of a hearing and in the assessment of evidence, including the determination of credibility when an appellant's evidence (or that of another witness) is being assessed. The emphasis, however, in AM does, perhaps, sharpen and intensify the importance of ensuring the procedure at the hearing is scrupulously fair and of the cautionary approach to the assessment of evidence given by an individual with demonstrable or (even) potential vulnerabilities.

25. For the reasons I have given, I am satisfied that the judge materially erred in law in reaching his adverse findings in respect of the appellant's claim to be at risk on return to Italy.

Decision

26. The First-tier Tribunal's decision involved the making of an error of law and the decision cannot stand. I set it aside.

27. The only course open to me, despite the continuing academic nature of this appeal, is to remit the appeal to the First-tier Tribunal for a *de novo* rehearing before a judge other than Judge Barcello. I do so fully expecting that no such appeal hearing will ever take place given that it is academic as the appellant is not, and will not be, subject to removal to Italy under the Dublin II Regulations.

Signed

A Grubb
Judge of the Upper Tribunal

22, November 2017