



Upper Tribunal
Immigration and Asylum Chamber

Appeal Number: PA/08515/2017

THE IMMIGRATION ACTS

Heard at Field House
On 28 June 2018

Decision & Reasons Promulgated
On 2 July 2018

Before

UPPER TRIBUNAL JUDGE KEKIĆ

Between

KHALID MOHAMMED ABDULLAH
(ANONYMITY ORDER NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the Appellant: Ms K McCarthy, Counsel instructed by Lupins
Solicitors

For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

Details of appellant and basis of claim

1. The appellant is a Sudanese national born on 12 April 1978. He claims to be a non-Arab Darfurian from the Berti tribe. He entered the UK in a lorry in April 2004 and claimed asylum on the basis of his ethnicity and his father's political activity with the Justice and Equality group. He

- maintained that his father had been arrested and tortured by the authorities and that he (the appellant) and his sister had been detained by the Janjaweed and that his sister had been raped. They managed to escape and then he left his mother and sister in Sudan and fled the country. The respondent did not accept the claim because of various inconsistencies but found that in any event he could relocate to Khartoum. The appellant's appeal was heard and dismissed by Judge Pitt in August 2005. She did not accept that he was credible and rejected his claim to be Darfurian. Her determination was upheld by the Upper Tribunal in November 2005.
2. The appellant did not embark and on 30 September 2009 his representatives made further submissions. On 9 December 2009, the appellant was granted indefinite leave to remain.
 3. On 16 September 2013 the appellant was convicted of attempted rape on a Lithuanian woman following a not guilty plea and a week-long trial. She had been walking to work in the early hours of the morning and the appellant had attacked her against a wall in a deserted street and used a weapon to threaten her. He received a prison sentence of eight years and has to register on the Sex Offenders Register indefinitely.
 4. Consequently, the respondent made a deportation order in accordance with s.35(2) of the UK Borders Act 2007. The appellant appealed on asylum grounds. His appeal came before First-tier Tribunal Judge L K Gibbs at Harmondsworth on 16 April 2018 and was dismissed by way of a determination promulgated on 18 April 2018. The appellant sought permission to appeal and this was granted by Judge Campbell on 3 May 2018.
 5. The matter then came before me on 28 June 2018.

Appeal hearing

6. At the hearing, I heard submissions from the parties. The appellant was present. I was told that he had been released on 19 April 2017.
7. Ms McCarthy relied on the four grounds for permission. She submitted that the judge had given inadequate reasons for rejecting the medical report of Dr Cohen, that there was no inconsistency between Dr Cohen's report and Ms Davies' report on the issue of memory loss and that it had not been open to the judge to raise the new issue of injuries self-inflicted by proxy without putting it to the appellant first. Secondly, she maintained that the judge's approach to the credibility of the claim was flawed in respect of the appellant's presence at political meetings held by

his father. Thirdly, the judge had been wrong to have rejected the claim that indefinite leave to remain had been granted on the basis of the respondent's acceptance of the appellant's ethnicity because there was no other basis on which the respondent could have granted leave. Finally, Ms McCarthy submitted that the judge had erred in her approach to the oral evidence of the witnesses. They had all confirmed the appellant's ethnicity and the judge had erred when she rejected their evidence due to her findings on the appellant. she submitted that none of the findings were sustainable and the appeal should be remitted to the First-tier Tribunal for a fresh hearing.

8. In response, Mr Tufan submitted that judges were not obliged to accept the contents of a medical report. He pointed out that the judge had given reasons for rejecting the report. He submitted that there had been a previous appeal before the First-tier Tribunal, the Upper Tribunal and the Court of Appeal and all had been unsuccessful. The judge was entitled to take as her starting point the finding that the appellant was not of the Berti tribe. The grant of leave had been under the Legacy programme as the appellant was someone who had claimed asylum and had not been removed. Anyone in his position was granted leave, barring any criminality and at that time the appellant had not committed the offence for which he was later convicted. He had committed a serious crime and that led to the deportation decision. the judge had considered all the evidence including the evidence of the witnesses and there were no errors in her determination.
9. Ms McCarthy replied. She submitted that the issue was not just the appellant's ethnicity but also the events in Darfur. The medical report had addressed all possible causes of scarring and had also considered the possibility of self-affliction. The grant of indefinite leave to remain from the respondent stated that this was due to his length of residence and compassionate circumstances. As the only circumstances known to the respondent were those included in the representations, the grant had to have been on the basis that it was accepted he was from the Berti tribe.
10. That completed the submissions. I should add here that Mr Tufan submitted the respondent's caseworker check sheet and CID case note when Ms McCarthy was making her submissions on the ILR issue. He clarified that he had meant to give the documents to her earlier but had not seen her and omitted to do so thereafter. Ms McCarthy asked me to note her dissatisfaction with the late submission of the documents. I offered her time to consider them but she did not take up my offer. At the conclusion of the hearing, I reserved my determination which I now give with reasons.

Consideration

11. I have considered the oral and documentary evidence before me and the submissions made by the parties.
12. The judge's findings and conclusions are contained at paragraphs 18-47 of the determination. It is not disputed that the appellant is a foreign criminal having received a lengthy eight-year sentence for attempted rape and no issue is taken with the judge's finding that he was unable to rebut the s.72 certificate because of his continued denial of culpability, lack of remorse, failure to address his offending behaviour and his continued attempts to blame the victim even after five years in prison (at 18-29). It follows that the decision to dismiss the appeal on asylum grounds stands.
13. The judge then proceeded to consider whether the appellant's deportation would breach articles 2 or 3. She deals first with the matter of the appellant's ethnicity and the appellant has taken issue with her findings. The judge took the determination of Judge Pitt as her starting point. Judge Pitt heard oral evidence from the appellant through an Arabic interpreter and made several adverse credibility findings. She rejected the claim that he was from the Berti tribe, that he was Darfur, that his father had been politically involved, that the appellant had been captured, held for five days without food or water tied to a tree, then tied to a horse for another five days with meagre food and water rations, shot in the head and suffered a broken shoulder yet managed to escape from his abductors and run home. She rejected the claim that there had been three raids on his house and that each time he had managed to hide and noted that he had made no mention of these raids in his statement. She found there was no evidence to support the appellant's contention that he would be identifiable as a member of the Berti tribe by his accent, hair and tribal markings. She also concluded that he would not be at risk because of his sur place activities. Neither or the last two points was relied on before Judge Gibbs.
14. Reconsideration was granted in respect of Judge Pitt's determination on two points; that it was the horse and not the appellant who had been shot, that the issue of ethnicity was not a live issue before her. the appeal was then heard by a panel of the Upper Tribunal chaired by Judge Gleeson on 7 November 2005. It was acknowledged that the statement had been unclear about the shooting and that a misunderstanding had arisen as a

- result but the Tribunal found that the single error did not negate all the other sustainable findings. The panel also noted that it had been open to Judge Pitt to make findings on the issue of ethnicity. The appellant then sought permission to appeal from the Court of Appeal and whilst that was granted on 19 May 2016 following an oral hearing, the appeal was dismissed on 11 June 2008 and the appellant was ordered to pay the respondent's costs. The actual judgment has not been produced by either party.
15. The point argued by the appellant is that Judge Gibbs was not entitled to rely on Judge Pitt's negative findings because subsequent to that the appellant had been granted indefinite leave to remain and that this could only have been on the basis of the representations he had made to the respondent in September 2009. The difficulty for the appellant is that this submission is based on speculation. The letter granting leave is dated 9 December 2009 and is included in the respondent's appeal's bundle. The relevant portion states: *"Your case has been reviewed"*. According to the caseworker check sheet the decision was made by the Legacy Case Resolution Team after the appellant had withdrawn his further representations in order for the legacy decision to be made (see CID case notes). Regrettably, the appellant has failed to make any mention of this withdrawal in any of his statements or evidence and subsequently changed representatives so it is not known whether his present representatives were even aware of this.
 16. The letter continues: *"...because of the individual circumstances of your case, it has been decided to grant you indefinite leave to remain...this leave has been granted exceptionally, outside the Immigration Rules. This is due to your length of residence...and compassionate circumstances"*. Ms McCarthy placed heavy reliance on the last sentence and argued that the only information known to the respondent was the contents of the representations and that indefinite leave to remain must, therefore, have been granted on that basis. The difficulty with that submission is that, as Mr Tufan argued, the respondent would have granted refugee status if he had accepted the appellant's claim. His rejection of it is indeed reinforced by the contents of his letter of 28 March 2017 refusing the appellant's challenge to deportation. In that letter the respondent rejected the asylum claim, as he had done in June 2004, and placed reliance on Judge Pitt's determination. Had the respondent granted indefinite leave to remain on the basis of his asylum claim, he would not have prepared a decision letter in these terms. Judge Gibbs was, therefore, entitled to take the view that the grant of leave was not on asylum grounds and to take Judge Pitt's determination as her starting point. Indeed, the evidence adduced at the hearing before me gives support to Judge Gibbs' approach because it clearly shows that

- leave was granted on legacy grounds and, therefore, was not based on an acceptance of the appellant's asylum claim. It follows that I conclude the judge made no error of law in applying Deevaseelan to Judge Pitt's determination.
17. Turning to the judge's treatment of the medical evidence, I note that the appellant's evidence was assessed in the context of Dr Cohen's report of 2 March 2018 (at 36). Dr Cohen referred to the appellant having memory problems but the judge noted there was no issue with the appellant's memory apparent from the report of the psychologist, Lisa Davies, of 8 March 2018. Indeed, she had found that he was "*generally orientated to time, place and person*" and that he engaged well throughout the assessment process. Whilst Ms McCarthy submitted he only had an issue with short term memory loss, which meant that Dr Cohen's report was not inconsistent with Ms Davies' report, Dr Cohen sought to rely on his memory problems to explain discrepancies relating to past events so she was plainly not just talking about difficulties in the appellant's recall of recent events. Judge Gibbs was fully entitled to make the observations she did at paragraph 37.
 18. The judge was also criticized for raising the issue of self-inflicted injuries /injuries inflicted by proxy as a new issue without putting this to the parties. It is plain from her determination, however, that this was a matter *raised by the respondent* (paragraph 39) and so the appellant's Counsel would have been alerted to this and had every opportunity to address it in her closing submissions. As it was raised as an issue before her, the judge was obliged to consider it. It is misleading to suggest that she was the one who raised it and that the appellant had not had the opportunity to respond.
 19. When considering Dr Cohen's opinion on the causes for scarring, it was open to the judge to find that other possible causes had not been fully explored. Indeed, as Mr Tufan submitted, the appellant's injuries from a scooter accident do not appear anywhere as possible causes of some of the scarring nor do possible scars from beatings sustained by the appellant at the hands of his father and/or teachers.
 20. The judge was also entitled to consider that the appellant had sought to embellish his claim by maintaining that he had been involved with his father's meetings. It is explained that this was not an embellishment because the appellant had previously said he used to make tea for his father's guests. This is hardly the same as a claim of being involved in the meetings. Indeed, the appellant's claim had previously been that he knew nothing of his father's activities and had not been told anything.

21. Finally, there is the matter of the evidence of the witnesses. The complaint is that this evidence was rejected solely because the appellant was found lacking in credibility. This wholly disregards the clear and compelling findings made in respect of the evidence of the appellant's brother at paragraphs 29-32. When the evidence was taken in the round, and the serious discrepancies in oral testimony and inconsistencies between that and the dates of documents were considered, it is hardly surprising that the judge found the evidence of the other witness failed to advance matters.
22. The judge has provided compelling reasons for her conclusions. The oral evidence on how the appellant's documents were obtained was wholly inconsistent and it appears that the appellant and his brother disagreed on several crucial matters and that they altered their evidence as the difficulties were put to them. The dates on the documents themselves contradicted the oral evidence of when they were obtained which raised further issues (at 29-35). No complaint has been made about the findings in respect of the appellant's father's death certificate and the certificate from the Berti National Administration.
23. The appellant had argued before Judge Gibbs that he would be at risk on return to Sudan because his conviction for attempted rape would be known to the Sudanese authorities. The judge found that this would not place him at risk (at 44-46) and no issue has been taken with this conclusion.
24. For the reasons set out above, I am satisfied that the First-tier Tribunal did not make any material errors of law which require the determination to be set aside. Her decision to dismiss the appeal on all grounds stands.

Decision

25. The First-tier Tribunal did not make errors of law and the appeal is dismissed on all grounds.

Anonymity Order

26. The First-tier Tribunal Judge did not make an order for anonymity and I was not asked to make one.

Signed:

A handwritten signature in black ink, appearing to read 'R. Kekić' with a period at the end. The letters are cursive and somewhat stylized.

Dr R Kekić
Judge of the Upper Tribunal

29 June 2018