



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/05452/2016

THE IMMIGRATION ACTS

Heard at North Shields
On 2 May 2018

Decision & Reasons Promulgated
On 16 May 2018

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

[K H]

~~[NO ANONYMITY ORDER]~~

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Ms Lynne Brakaj, solicitor with Iris Law Firm Solicitors.

For the respondent: Mr Myroslav Diwnycz, a Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission against the decision of the First-tier Tribunal dismissing his appeal against the respondent's decision to refuse him international protection under the Refugee Convention, humanitarian protection, or leave to remain in the United Kingdom on human rights grounds. The appellant is a citizen of Sudan and claims to be a member of the 'Al Berti' tribe.

2. The Berti tribe are one of Sudan's non-Arab tribes and are of Darfuri origin. If the appellant is a member of the Berti tribe, he is a non-Arab Darfuri to whom the Upper Tribunal's country guidance in *MM (Darfuris) Sudan (CG) [2015] UKUT 10 (IAC)* and *AA (Non-Arab Darfuris-relocation) Sudan CG [2009] UKAIT 00056* are applicable.

Background

3. The appellant is 29 years old and worked as a rickshaw driver in Sudan. He says that in Sudan he was arrested and detained on two occasions. The first time, in 2013, he says he was accused of distributing leaflets, writing on walls, and participating in an oppositionist demonstration; the second, in 2015, was also connected with participation in a demonstration.
4. The appellant left Sudan in May 2015, travelling via Libya, where he spent four months, and then via Italy and France to the United Kingdom, where he arrived clandestinely on 3 December 2015 and claimed asylum the next day.
5. The appellant says that in Italy, the protection for asylum seekers was inadequate as they were given no food or water, just canvas shelter; in France, he did not claim asylum because his perception was that 'the [French] police beat people'. The appellant contends that he remains at risk in Sudan now if removed there.

First-tier Tribunal decision

6. The First-tier Tribunal Judge noted at [16] that the respondent accepted that the appellant was whom he claimed to be and a Sudanese citizen. The appellant did not pursue any claim under Article 8 ECHR or for humanitarian protection: the appeal sounded only under the Refugee Convention and/or Article 3 ECHR.
7. The First-tier Tribunal Judge applied part VA of the Nationality, Immigration and Asylum Act 2002 (as amended), section 8 of the Asylum and Immigration (Treatment of Claimants etc) Act 2004, and paras 339L and 339M (but not 339K) of the Immigration Rules HC 395 (as amended). He also noted a number of leading decisions, at [12] in his decision. The body of the decision suffers from a *Mibanga*-like failure in that the credibility findings and conclusions largely precede the summary of the evidence. Conclusions are reached on credibility generally before consideration of the asylum and Article 3 claims.
8. At [17] the Judge notes the appellant's claimed Berti tribe ethnicity, derived from parents of the same tribal ethnicity, and that the appellant said he was living in the Omdurman area of Khartoum when his difficulties began. However, the Judge appears determined to reject the appellant's credibility and in particular, his membership of what the Judge describes as the 'Al Berti' tribe. He does so in multiple paragraphs of the decision. At [44]-[45] he rejects the appellant's claim of being involved in demonstrations and having been tortured, for want of corroboration. At [36], he rejects the appellant's claim that his wife was also detained, again for lack of corroboration.
9. The earliest negative credibility findings in the decision are at [14]-[16] and are by reference to section 8 and the appellant's failure to claim asylum in Italy or France (the

latter is repeated in several other places in the decision). This conclusion is reached before any attempt to make an overall evaluation of the credibility of the appellant's evidence on a holistic basis as required by *SM* (Section 8: Judge's process) Iran [2005] UKAIT 00116.

10. The summary of this appellant's evidence appears in the decision at [18]-[31], after which there are further findings of fact at [32] which are internally contradictory:

"32. I accept that the appellant is a Sudanese national. I can also accept that he may be a member of the Al Berti tribe. His tribal membership does not alienate him from the authorities, on the evidence before me today. On his own evidence, he has claimed to have lived in a mixed community all his life. However, I have to say that he is [sic] not satisfied me to the lower standard, that he is a member of this tribe as a result of the inconsistencies, anomalies and lack of detail arising in his evidence through interview, statement and cross-examination. Membership of this tribe is not the issue. It would appear to be that he got involved in some form of political demonstration."

[Emphasis added]

11. The evidence concerning attendance at two political demonstrations is rejected at [32]-[34] and in the alternative, at [35], the Judge found that 'even if there were an element of truth to this aspect it is clear again from his own evidence that the authorities have not demonstrated any adverse interest in his family members'. The appellant's evidence of his torture at the hands of the authorities in Sudan is also rejected, as is the detention of his wife (at [36], apparently for want of corroboration).
12. At [37] the Judge found the appellant not to be 'a good witness of truth' and his evidence to be unreliable. He was satisfied that the appellant could safely be returned to his home country 'without fear of misfortune, adverse attention, or otherwise'.
13. At [38], in what appears to be a largely standard paragraph, the Judge said this:

"38. On the evidence before me today, I am satisfied that the appellant has not provided any credible basis for challenging the assertions, analyses and conclusions in the respondent's refusal letter. On the evidence before me today, I am satisfied those assertions, analyses and conclusions are valid and tenable and I reach similar conclusions myself [for] like reasons. I find that the appellant's failure to claim asylum when he could have first claimed, while in Italy and France, without a satisfactory explanation, undermines the credibility of the appellant's claim to have come to the United Kingdom to escape persecution. That credibility is further undermined by the inconsistencies and implausibilities in the story, examples of which I have referred to above. I find therefore that the core of the appellant's account of persecution lacks credibility and is a fabrication designed to gain access to the United Kingdom.

39. On the evidence before me today [I] am satisfied that the appellant is an economic migrant and has not come to the United Kingdom to seek international protection."

14. At [21]-[22], the Judge rejected the appellant's claim to have been subject to an attempted, or an actual, rape in detention. The Judge notes the appellant's account of being left exposed in the sun and having his fingernails removed, and of being tortured

on every day of his 20 days' detention: the Judge considers that if the authorities intended to do this, they would not have allowed the appellant to dress before taking him from his home, nor allowed him to bid farewell to his wife. He characterises as evasive and less than convincing the lack of evidence of the appellant's injuries and the appellant's oral evidence, but sets out no specific examples of evasiveness other than the earlier statement of attempted rape becoming actual rape in the appellant's oral evidence at [24].

15. The appellant appealed to the Upper Tribunal, contending that the Judge took no account of the possible effect on him of recounting his trauma in the Tribunal hearing; that the Judge failed to recount the appellant's motivation for becoming involved in demonstrations (protesting against issues which affected him) and evidence of his attendance at similar demonstrations in the United Kingdom; that a letter from the Berti Tribe in the United Kingdom confirming his ethnicity was overlooked in the decision; and that that 'the respondent's [Presenting] Officer did not appear to pursue certain lines of questioning'.

Permission to appeal

16. Upper Tribunal Judge Coker granted permission to appeal on the basis that the decision relied upon 'arguably unidentified and undocumented claimed evasiveness' and that it was arguable that the First-tier Tribunal Judge erred in law in dismissing the appeal. In addition, the Judge noted (and the excerpts above from the decision confirm) a significant number of grammatical and typographical errors, suggesting that the Judge had not proof read his decision before promulgating it.

Rule 24 Reply

17. The respondent in his Rule 24 Reply asserted that the First-tier Tribunal Judge had 'directed himself appropriately' (but not as to what) and that notwithstanding the acknowledged typographical errors in the decision, 'the Judge's reasoning is fully comprehensible and sufficiently detailed'. The respondent considers that the grounds of appeal 'amount to no more than a disagreement with lawful conclusions'.
18. That is the basis on which this appeal came before the Upper Tribunal.

Upper Tribunal hearing

19. At the Upper Tribunal, Mr Diwnycz accepted that the decision of the First-tier Tribunal was inadequately reasoned and cannot stand. That decision will be set aside. I proceed therefore to remake the decision on the basis of the evidence which was before the First-tier Tribunal.

Discussion

20. I remind myself, when assessing credibility, that the totality of the evidence must be taken into account. If there is a credible account of past torture or threats of serious harm, then applying paragraph 339K of the Rules, good reason must be shown by the respondent why it will not recur. I note that while the Presenting Officer in the First-tier Tribunal asked the appellant how long he was detained, and whether his wife was

still detained, the appellant was not given the opportunity to respond to any allegation that the detention did not take place and the Presenting Officer's submissions were not that he was not detained, but related to his failure to attend the police station following his release from detention. The appellant has not produced any medical evidence to support his claim to have been tortured while in detention. If this appeal were limited to his oppositionist activities and detention, I would not consider that the evidential burden on the appellant had been discharged.

21. However, the evidence before the First-tier Tribunal included the appellant's evidence, in writing, at interview, and before the Tribunal, that he is a member of the Berti tribe, supported by a letter and interview record from Dr Salah Osman, Chairperson of the Berti and Tunjour Community United Kingdom, and photographs of the appellant attending Darfuri demonstrations in London. That evidence was not weighed. I note the submissions of the Home Office Presenting Officer at the First-tier Tribunal that the appellant's answers about the Berti tribe were generally evasive, but also (from the manuscript record of proceedings) that it was not put to the appellant that he was lying about his membership of that tribe.
22. The Presenting Officer submitted that the credibility of the appellant's membership of the Berti tribe was damaged by his living in another area, away from his tribe, and that he might be a member of a different tribe. That also was not put to the witness, and the Presenting Officer did not specify which tribe he might mean (there are other non-Arab tribes of Darfuri origin). I have regard to the decision of the Upper Tribunal in *MM* which states that 'Darfuri' is an ethnic term relating to origins, not a geographical term, and covers even Darfuris not born in Darfur, and the guidance in *AA (Sudan)* that all non-Arab Darfuris are at risk of persecution in Darfur and cannot reasonably be expected to relocate elsewhere in Sudan.
23. On the basis of the evidence before the First-tier Tribunal, and applying the lower standard of proof applicable to international protection claims, I am satisfied that the appellant is a member of the Berti tribe. That finding alone is determinative of this appeal in his favour.

DECISION

24. For the foregoing reasons, my decision is as follows:

The making of the previous decision involved the making of an error on a point of law.

I set aside the previous decision. I remake the decision by allowing the appeal on Refugee Convention and Article 3 ECHR grounds.

Date: 11 May 2018

Signed

Judith AJC Gleeson

Upper Tribunal Judge Gleeson