



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/11811/2016

THE IMMIGRATION ACTS

At: Manchester Civil Justice Centre
On: 18th April 2018

Decision Promulgated
On: 19th April 2018

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

AE
(anonymity direction made)

Appellant

And

The Secretary of State for the Home Department

Respondents

Representation:

For the Appellant: Ms Patel, Lei Dat & Baig Solicitors

For the Respondent: Mr Bates, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a national of Sudan born in 1986. He appeals with permission against the 26th July 2017 decision of the First-tier Tribunal (Judge Moxon) to dismiss his protection appeal.

Anonymity Order

2. This appeal concerns a claim for international protection. Having had regard to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 and the Presidential Guidance Note No 1 of 2013: Anonymity Orders I therefore consider it appropriate to make an order in the following terms:

“Unless and until a tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies to, amongst others, both the Appellant and the Respondent. Failure to comply with this direction could lead to contempt of court proceedings”

Background and Matters in Issue

3. The Appellant asserts a well-founded fear of persecution in Sudan for reasons of his ethnicity. He claims to be a member of the Massalit tribe, a non-Arab ethnic group from Darfur. It is common ground that if the Appellant can establish to the lower standard that he is Massalit, then he will be entitled to protection under Article 1A of the 1951 Refugee Convention: AA (non-Arab Darfuris - relocation) Sudan CG [2009] UKAIT 00056, MM (Darfuris) Sudan CG [2015] UKUT 00010 (IAC).
4. In her decision to refuse, dated 12th October 2016, the Secretary of State for the Home Department does not accept that the Appellant is Massalit. It is noted that during his screening interview, and in his application for NASS support, he gave his ethnicity as ‘Salamat’. The Appellant further claims to have been educated to the extent that he was able to take on a teaching role during his military service: this is inconsistent with the country background evidence which indicates that very few non-Arab Darfuris receive any education. The fact that the Appellant had been conscripted would also tend to indicate that he is not Massalit, as did his fluency in Arabic. There was no evidence before the Secretary of State that the Appellant spoke Massalit and in these circumstances she was not prepared to attach much weight to the Appellant’s correct answers when asked about the African tribes of Darfur. Having reached those findings on the central matter of ethnicity the Secretary of State went on to reject the Appellant’s claims that he had been subjected to arrest and detention in Sudan, and that he had been falsely accused of attempting to murder a well-known figure in the regime, a Mr Ali Khushayb.
5. When the appeal came before the First-tier Tribunal the Appellant relied on the following evidence:
 - i) A witness statement in which he explained *inter alia* that at the screening interview there had been confusion between him and the interpreter. He had told the interpreter that his mother is Salamat and his father is Massalit but only the former fact was recorded.

When the record had been read back to him he had corrected this mistake by way of letter from his solicitors dated 11th May 2016. The Appellant disputed the assertion that his NASS form said he was Salamat: that too had been amended and now reads “Msaleit Africa”. He had undertaken national service in a civilian capacity.

- ii) An expert report by Mr Peter Verney. Mr Verney is an expert well known to the Tribunal. Mr Verney found the Respondent’s assertions as to the Appellant’s likely level of education to be “bizarre” and “false”. He attested that many Massalit speak Arabic. Having interviewed the Appellant himself, and read all the relevant documents, Mr Verney concluded that the Appellant had “demonstrated convincingly” that he is from the Massalit tribe as claimed. He notes that the Appellant speaks Arabic with a notable Darfuri accent, and is able to speak Massalit to an extent that made it unlikely that he did not have at least one parents from that tribe. His description of the area that he claims to come from was “completely lifelike”. Dr Verney found nothing in the account to be damaging to the Appellant’s credibility as a witness. He also explained that Ali Khushayb, the man whom the Appellant is accused of trying to kill, is wanted by the International Criminal Court and is well known for his involvement in attacks on the Salamat, the tribe of the Appellant’s mother. The Respondent’s theory that the Sudanese authorities would not use Darfuris to fight against other Darfuris is demonstrably wrong: that has been their policy from the outset.
 - iii) A witness statement from AS, a man recognised as a refugee on the grounds that he is from the Massalit tribe. AS attested that he knew the Appellant personally in Sudan and that knows him to be Massalit.
 - iv) A letter from the Msaalit Tribe Association of South Darfur State attesting that in their opinion the Appellant is Massalit.
 - v) A medical report by Professor Kayvan Shokrollahi stating that the Appellant bears four areas of scarring, to his head and leg.
6. The First-tier Tribunal drew adverse inference from the recording of the term ‘Salamat’ in the screening interview, noting that the Appellant had signed to say that he understood the interpreter, and had been inconsistent as to whether he had raised problems at the interview itself. It further found against the Appellant on the following matters. The Appellant had not claimed to be afraid because of his membership of a particular tribe: he had described being afraid of arrest and being pressured into joining a militia. The NASS application said that the Appellant is Salamat. The Appellant has been inconsistent about how much Massalit he actually spoke. As to Mr Verney the Tribunal found that he had sought to advocate for the Appellant rather than acting as an expert for the court. He had used “emotive language” towards the Home Office. He is not a linguistics expert and should not present himself as such. It is unclear how he

reached his conclusions about the Appellant's ethnicity. His comment that the Appellant "looks Massalit" is unexplained and has no scientific basis. The Tribunal considers that Mr Verney may not have had all of the relevant information before him, for instance it is unclear whether he had the NASS application. The Tribunal nevertheless recognised that Mr Verney is an expert and that considerable weight could be attached to his evidence about Sudan.

7. The determination goes on to identify a number of discrepancies in the account given about what happened to the Appellant in Sudan. He claims that he was beaten with plastic pipes on his back and legs but the only scars that the doctor found were potentially from pliers being applied to his ears and from being kicked in the head: "these inconsistencies considerably undermine the Appellant's account of having been tortured". The medical report fails to consider whether there were other causes of the scarring. In respect of AS the Tribunal notes that he was found to be credible, and Massalit, by another judge and that this adds weight to his testimony; however it is undermined by his "evasive" evidence under cross-examination and the fact that the two men were inconsistent about how long it had been since they saw each other. The reliability of the letter from the Msaalit Tribe Association is undermined by the "various adverse credibility findings made against the Appellant". Finally weight was to be attached to various matters arising under section 8 of the Asylum Immigration (Treatment of Claimants etc) Act 2004. The First-tier Tribunal concluded that the Appellant had not discharged the burden to the lower standard of proof in showing that he was Massalit and the appeal was dismissed.
8. The Appellant now challenges that decision on several grounds:
 - i) Failure to give proper consideration to material evidence;
 - ii) Failure to give reasons;
 - iii) Failure to engage with medical report.
9. For the Respondent Mr Bates defended the decision on all grounds.

Discussion and Findings

10. At the centre of this appeal is the expert report of Mr Peter Verney. The Tribunal recognised that Mr Verney is an expert [at §47], and that his evidence "about Sudan" should attract considerable weight [at §94]. It nevertheless declined to give any significant weight to his conclusions about this particular Appellant.
11. The first reason it give for so doing, at paragraph 92 of the decision, is that Mr Verney is said to have asked 'leading questions' in his interview with the Appellant, not to have acted with impartiality, and at "various stages" to have advocated on the Appellant's behalf.

12. Before me Mr Bates accepted that the Tribunal had not set out in terms what it meant when it said that Mr Verney had asked the Appellant “leading questions”; nor does the determination explain in what way he might have “advocated on behalf of the Appellant”. He nevertheless submitted that these were findings open to the Tribunal. He took me to Mr Verney’s transcript of his interview with the Appellant where the following exchange is recorded:

“15. Is it correct that you told the HO that your father is from the Masalit tribe and your mother is from the Salamat tribe? I asked him.

16. Correct, he said.

17. Because people trace ethnic identity principally through the paternal line, this means you are regarded as Masalit, correct?

18. Yes, he said”.

Mr Bates submitted that it was inappropriate for Mr Verney to have led the Appellant in this way and that his approach must detract weight from the positive conclusions he reached about the Appellant’s ethnicity.

13. Setting aside the obvious point that Mr Bates was now seeking to perfect the determination by giving reasons where the Tribunal had not, there are two further problems arising from his submissions. First, Mr Verney does not appear himself to attach weight to the positive responses he elicited from the Appellant; it is therefore difficult to see how his overall conclusion could be tainted by them. Secondly, and more importantly, the passages that Mr Bates took me to (and, it must be presumed the passages that the Tribunal had in mind at its §92), must be read in context. They are under the heading “transcript of interview and observations” and come after the following explanation:

“I told him I would go through the refusal decision letter with him **to check that his account has been understood properly and address any points arising in the refusal**” (my emphasis).

Seen in this context it is very difficult to see what could possibly be objectionable about Mr Verney reciting matters raised in the refusal letter to check if he had understood the issues properly. He was not testing the Appellant’s evidence – that was not his role. His role was to evaluate the plausibility of the claim against his own expert knowledge of Sudan and to offer an opinion on whether this man was Massalit. In doing so he was perfectly entitled to begin his assessment by checking that he understood the basis of the Appellant’s claim. The fact that these questions may have been ‘leading’ was neither here nor there.

14. The Tribunal’s reasoning on this point is therefore set aside. It did not give cogent reasons for impugning Mr Verney’s objectivity as a witness (itself a serious error), and in making its findings failed to take important evidence into account, namely the passage that I have just set out which explains why the

questions were put in the manner that they were. There was further no attempt to reconcile the adverse findings with the evidence of Mr Verney – again unchallenged – that he rejects the claims of “non-Arab connection” in approximately *half* of the cases referred to him. If that assertion was accepted, which it expressly was at the Tribunal’s §93, it is all the more difficult to understand the overall conclusion that his evidence was somehow tainted by partiality.

15. As to whether Mr Verney was entitled to offer opinion on the Appellant’s language skills the Tribunal places what appears to be considerable weight on the fact that Mr Verney is not, by profession, a linguist. At paragraph 96 the Tribunal consider Mr Verney’s evidence that the Appellant spoke with a Darfuri accent and knew some Massalit words and finds: “I do not accept that Mr Verney has the expertise to give this evidence and in any event he has failed to fully outline his rationale”. At paragraph 95 it states that it is unclear whether all of the questions asked are in the report, whether the Appellant got the answers correct, how close the Massalit is to the Arabic and whether the Appellant pronounced the words correctly.
16. Mr Verney made no claims to be a linguist. What he does say, and what is uncontested, is that he has been working in or ‘on’ Sudan since 1977. He has worked in various capacities for a number of NGOs including Save the Children. He has held a number of academic positions including at the School of Oriental and African Studies in London and at the Khartoum Academy of Administrative Sciences. He has worked for the Sudanese government in both the Education and Culture ministries and has been commissioned as a Special Advisor on Darfur by our own House of Commons. He asserts, and again this was not contested, that he speaks fluent Arabic, and in particular “conversational colloquial Sudanese”. He explains that he learned the language in the 12 continual years that he spent living in Sudan, and because for 9 years he has been married to a Sudanese woman. In his assessment of the Appellant Mr Verney states that he communicated with him directly, using this form of colloquial Arabic, but that there was an Arabic speaking interpreter there to offer assistance. It is against that background, all set out in detail in Mr Verney’s report, that his evidence on the Appellant’s language skills had to be judged.
17. In my view it borders on perversity to suggest that Mr Verney would not be able to comment on the Appellant’s regional accent. He has over 30 years association with Sudan, is married to a Sudanese woman and spent 12 years of his life continuously living there as well as numerous other periods of stay and visits. He has spent time living in Geneina, the Western Darfur homeland of the Massalit. His entire working life revolves around the country and its nationals. He speaks Arabic, and specifically, speaks “colloquial Sudanese”. I do not think, in those circumstances, that he needs to be a qualified linguist to be able to say that the Appellant speaks with a Darfuri accent. Presumably, given his adherence to the *Ikarian Reefer* principles, Mr Verney would not have

offered this opinion if he did not think himself able to give it. I would note that the Tribunal appears to have taken no issue with the opinion formed by an immigration officer and Home Office interpreter – presumably neither qualified linguists – that the Appellant speaks ‘Sudanese’ Arabic, itself an assessment of accent (at §11 RFRL).

18. As to Mr Verney’s qualification to comment on whether the Appellant can speak Massalit it is of course not the case that he purported to conduct a linguistic analysis of fluency. What he did was give the Appellant a series of Arabic words and asked him for the Massalit equivalent - dark skin, man, the numbers 1-10, greetings, good morning, good evening, ‘how are you?’ and ‘I am going to market’. He checked the answers against his own information and with a Massalit colleague. Paragraph 115 of his report records that the answers were correct. The Tribunal is therefore wrong as a matter of fact to state that the report did not set out the questions asked, or whether the Appellant got them right. The insinuation that Mr Verney might have deliberately omitted to record any answers that the Appellant got wrong is an allegation unsupported by the evidence, and is at odds with the Tribunal’s own acceptance of Mr Verney’s record. If he is an expert who has had the professional integrity to give – if I can put it like this – negative opinion on approximately half of the cases referred to him, in the absence of any indication to the contrary it can be assumed that Mr Verney will act with probity. The Tribunal has further failed to take into account the evidence in the report itself about Mr Verney’s methodology, which has been approved by Professor Emeritus (Oxon) Wendy James FBA, CBE. and Professor Douglas H Johnson of Oxford University who has confirmed to Mr Verney that his method is “pretty much standard for field working linguists who don’t themselves speak the languages they are studying”. Finally I would note that this particular issue was not raised by the Respondent who made no criticisms of Mr Verney’s ability to comment on the use of Massalit terms or the Appellant’s Darfuri accent. If this was evidence that the Tribunal was minded to reject it might fairly have put the Appellant’s representatives on notice of this, given Mr Verney’s suggestion at paragraph 116 of his report:

“If my assessment of his language capability is not accepted, then it is clear that he shows sufficient merit to be subjected to further enquiry with a recognised Masalit speaker”.

19. I need say no more about Mr Verney’s overall assessment of the Appellant save to note that he himself placed limited weight on his opinion of the Appellant’s appearance, accepting that it is not a matter upon which one could place “excessive reliance”. The extent of his evidence was that the Appellant’s claim to be Massalit was not inconsistent with his appearance, since he “clearly resembled” other Massalit that Mr Verney had met, and perhaps more importantly, would have the non-Arab appearance that might arouse the interest of the Sudanese security services. This was of some significance to the risk assessment, yet it does not feature in the determination. In considering how

the Appellant would fare under questioning about his origins Mr Verney writes:

“He cannot lie or dissemble in the face of such questions, as they will know from his appearance and accent that he is non-Arab Darfuri”.

20. In light of the foregoing I am satisfied that this is a determination that cannot stand. In respect of that one central piece of evidence – the Verney report – the First-tier Tribunal has failed to take material evidence into account, failed to give adequate reasons, has made mistake of fact and has arguably made perverse findings.
21. I need not therefore dwell at length on the remaining elements of the challenge.
22. Some complaint is made about the approach taken to the evidence of AS. This was witness who had been found to be “truthful” by the Tribunal in his own case and whose evidence before the First-tier Tribunal in this case was found to be largely consistent. His testimony was nevertheless apparently rejected because he was “evasive” under cross-examination. Mr Bates accepted that no explanation is given for that finding and he was unfortunately not able to read the note taken by the HOPO to see what might have led to it. It is an error of law to reach adverse credibility findings about a witness without giving clear reasons why. The evidence of AS is a) that he is Massalit b) that many years ago he knew the Appellant in Sudan and c) that to the best of his knowledge and belief the Appellant is also Massalit. There were, in essence, three options open to the Tribunal in assessing this evidence. He could be found to be truthful, he could be found to be truthful but mistaken or unreliable about the Appellant’s tribal identity, or he could be found to be lying. I cannot discern from the determination which of the three it was.
23. The reliability of the letter from the Massalit Tribal Association is found to be “undermined by the various credibility findings made against the Appellant”, in what purports to be a *Tanveer Ahmed* assessment. I am not satisfied that Tanveer Ahmed is authority for the proposition that item of evidence ‘B’ can be discounted because item of evidence ‘A’ has already been rejected. The approach is to consider all of the evidence in the round, and apply the lower standard of proof. I am not satisfied that this is what has been done here.
24. Had the appeal rested simply on ground (iii) I would have dismissed it. The medical report that the Appellant sought to rely upon purported to be compliant with the Istanbul Protocol but was couched in extremely brief terms. Mr Bates was quite right to point to an obvious deficiency in the evaluation of the scars since Professor Shokrollahi does not consider what the alternative causes of the scarring might be. At best they are each found to be ‘consistent’ with the claimed cause (torture with pliers, beating) and in those circumstances the Tribunal was bound to place limited weight on those findings.

25. Given what I have said, particularly about Mr Verney's report and its contents, it might be assumed that this is an appeal that could properly be re-made by the Upper Tribunal without the need for further hearing. What this decision has not however touched upon is the Secretary of State's continued challenge to the Appellant's account of past persecution in Sudan. It is her contention that this narrative is fiction, and that this, coupled with the NASS report and the screening interview, is enough to displace the Appellant's evidence about his ethnicity, even corroborated as it is by Mr Verney, AS and the association. I therefore consider it appropriate that the matter be remitted to the First-tier Tribunal so that it may be heard afresh by a First-tier Tribunal Judge other than Judge Moxon. Ms Patel accepted that this was a proper disposal of the matter.

Decisions

26. The decision of the First-tier Tribunal contains errors of law such that it must be set aside. The decision will be remade *de novo* in the First-tier Tribunal.
27. There is an order for anonymity.

Upper Tribunal Judge Bruce
19th April 2018