Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/02037/2011

THE IMMIGRATION ACTS

Heard at Bennett House, Stoke-on-Trent	**Date sent**
On 8th August 2013	**On 9th August 2013**

Before

UPPER TRIBUNAL JUDGE MARTIN

Between

MR ABDALLAH BENABDESELAM OUELD-DADA

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mrs R Kullar (Sultan Lloyd, Solicitors)
For the Respondent: Mrs K Heath (Home Office Presenting Officer)

DETERMINATION AND REASONS

1. The Appellant comes from the area of Africa known as Western Sahara, an area partly in Mauritania, partly in Morocco and partly in Algeria. He came to the UK in November 2010 and claimed asylum in December 2010. That application was refused on 4th February 2011.

2. The Appellant appealed and his appeal came before the First-tier Tribunal (Judge Cox) at Stoke-on-Trent on 5th May 2011. She dismissed the appeal on all grounds.

3. The Appellant sought and was granted permission to appeal to the Upper Tribunal and the matter then came before me on 6th October 2011. My task on that occasion was to decide whether the First-tier Tribunal had made an error of law and if so whether and to what extent the determination should be set aside.

4. On 6th October 2011 I found as follows:-

    a. "Before me the Appellant's representative challenged the Immigration Judge's adverse credibility findings. Mrs Aboni sought to defend the determination.

    b. The grounds assert firstly that at paragraph 35 of the determination the Immigration Judge misunderstood the evidence and found, perversely, that the Appellant claimed that living amongst his group, namely the people with whom he lived and travelled with, were members of Polisario whereas that had not been the Appellant's evidence. The grounds suggest that the evidence was that some members of the Appellant's tribe were working for Polisario in the north and that one member of his camp worked at the Polisario camp where the Appellant had been detained. The Immigration Judge did not misunderstand the evidence. It is quite clear from looking at the determination and the Appellant's witness statement that he claimed to live in a group of fifteen persons. The Polisario would regularly come to recruit. Some would go voluntarily, others by force. He managed to escape the attention of the Polisario by going into the desert until they had left. The Immigration Judge found that if people from his own group were working voluntarily for Polisario which is what he had said, then it is inconceivable that they would not have noticed his absence from the camp. There is no error in the judge's finding.

    c. The grounds then assert that paragraph 36 of the determination is unintelligible. I agree that the determination is poorly proofread. However, I do not find any significant error. It is quite clear that the Immigration Judge found that if various members of the tribe worked for the Polisario and one such assisted the Appellant, this did not sit with the Appellant's claims that they acted in a violent fashion. That is a finding open to the Immigration Judge on the evidence. Further, the grounds assert generally that the judge's findings are unintelligible and unreasoned. The grounds make numerous allegations of perversity or unintelligibility. That is inappropriate; the test for perversity is a high one.

    d. Reading the determination as a whole it is quite clear that the Appellant in this case claimed to have lived in a group of 15 nomadic herdsmen in Western Sahara. The Polisario regularly came to recruit. The Appellant says he was taken by them and detained and ill-treated but because he refused to work for them they simply let him go. As the Immigration Judge found, there is no evidence that the Appellant's life was or will be at risk from the Polisario. They released him because he was unwilling to join with them. That does not indicate they wanted to kill him.

    e. Further, as the Immigration Judge pointed out, the expert report does not support the Appellant's claims. There is no evidence of the Polisario forcibly recruiting. The Immigration Judge noted that the expert said that just because there was no evidence of the Polisario behaving in the way claimed that does not mean that it did not happen to the Appellant. The Immigration Judge, whose task it was to determine the Appellant's credibility, taking all the evidence into account found him without credibility.

    f. The Immigration Judge also found that even were the Appellant at risk in his home area he could relocate. That was a finding open to her.

g. I do not disturb the Immigration Judge's findings of fact.

h. However the determination cannot stand. What the representatives, the Immigration Judge and Senior Immigration Judge have failed to appreciate is that the Appellant's case is that he is a national of Western Sahara and that he was targeted there by the Polisario and will be at risk on return.

i. In the Letter of Refusal the Secretary of State does not accept the Appellant's claimed nationality or claimed persecution and asserts that he will be safe if retuned to Western Sahara.

j. However Article 1A provides that a refugee is a person who, owing to a well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion is outside the country of his nationality and is unable or, owing to such fear is unwilling to avail himself of the protection of that country; or who not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear unwilling to return to it.

k. The significance is the word "country". Western Sahara is not recognised as a country by the United Nations or by the British government. Western Sahara is a vast area of West Africa that is partly in Morocco and partly in Mauretania. Arguably it is also in part in Algeria. In order to succeed the Appellant must show that he is a national of a "country" or habitually resident in one and at risk in that "country". So much was made clear by the starred decision of Dag (Nationality – Country of Habitual Residence – TRNC) Cyprus* Country Guidance [2001] IAT 00002.

l. Accordingly the Immigration Judge was in error in considering and treating Western Sahara as a country and I set the determination aside. I preserve the findings however in relation to credibility.

m. I will rehear the case on the basis that the Appellant needs to show which country he is a national of or was habitually resident in and that he will be at risk on return there".

5. Intervening events then occurred to change the nature and direction of this appeal. The matter came before me for the resumed hearing on 29th March 2012 when an adjournment application was made on the Appellant's behalf. The application was to await an expert's report but more significantly care proceedings had been commenced in relation to the Appellant's young son, born on 8th March 2012. The Appellant and the child's mother did not live together and at that stage all we knew was that there had been initial plans to place the child with the Appellant but in fact the child was with its maternal grandmother. It was therefore agreed that the matter should be listed for a directions hearing on 11th May and on that date I wrote to the Social Services Department of Stoke-on-Trent City Council. I had been told that the Appellant had been given leave for papers to be disclosed to the Upper Tribunal and the Home Office in relation to the ongoing care proceedings. I indicated that on the basis that the Appellant was being assessed by Social Services as to his suitability to care for his son the Upper Tribunal appeal had been adjourned to 16th August to allow that assessment to be completed. With the authority of the Home Office I also informed Social Services that if the assessment concluded that the best interests of the child indicated a placement with the Appellant, his presence in the United Kingdom was secure.

6. On 16th August I was informed that at a hearing in the Family Court on 7th August it was agreed by the Local Authority and the child's guardian that because of the mother's medical condition it was important that there be a two-week observation of the Appellant with the child at a father and baby unit. That had started on 9th August and ended the day of the hearing. I was told there was an "Issues Resolution Hearing" listed for 24th September and that it was agreed that, subject to the outcome of the observation, there was no reason why the child could not be placed in the sole care of the Appellant. I therefore directed the Upper Tribunal hearing be heard on 8th October and that if the care proceedings should not proceed as anticipated the representatives must notify the Upper Tribunal.

7. It is from that point that matters went awry. It was concluded by the Family Court that the child should be placed with the Appellant and on that basis the Secretary of State granted him discretionary leave until 2015 and wrote to the Upper Tribunal seeking to withdraw the decision of 4th February 2011. The case was then taken from the list and an Upper Tribunal Judge issued a notice on 7th December 2012 indicating that the appeal had been abandoned under the provisions of section 104 of the Nationality, Immigration and Asylum Act 2002. That was in fact incorrect and in order to finally resolve matters the appeal came before Upper Tribunal Judge Kopieczek on 8th March 2013.

8. He said, issuing further directions, this:-

   i. It is to be noted that at the hearing before me on 26 February 2013, the respondent conceded that the Appellant has a right of appeal against the decision to refuse to grant asylum notwithstanding that the Appellant has been granted leave to remain until 1 May 2015. The appellant has given appropriate notice pursuant to section 104 (4B) of the Nationality, Immigration and Asylum Act 2002 and the decision in Win (section 83-order of events) [2012] UKUT 00365 (IAC) applies.

   ii. The Notice of abandonment dated 7 December 2012 by Upper Tribunal Judge McGeachy, is to be treated as having been provisional only pending the application of section 104 (4B) of the 2002 Act.

   iii. It is also to be noted that at the hearing on 26 February 2013 the parties agreed that the letter from the respondent dates 3 October 2012 purporting to withdraw the decision under appeal (a decision to remove the appellant dated 4 February 2011) operates only as a withdrawal of the respondent's case that the appellant is to be removed from the UK but not as a withdrawal of its case that the appellant is not entitled to asylum.

   iv. It was conceded on behalf of the appellant at the hearing on 26 February 2013 that in the remaking of the decision before the Upper Tribunal, the credibility findings made by the First-tier Tribunal are to stand (previously indicated in the decision of Upper Tribunal Judge Martin dated 10 October 2011).

   v. At the hearing on 26 February 2013 the respondent was directed, no later than 14 days from that date, to issue clarification of the residence documentation provided to the appellant which appears to state that he has been granted refugee status, rather than discretionary leave. That direction must be complied with.

vi. No later than 14 days from the date on which these directions are sent out, the appellant must file and serve any further evidence relied on, including any expert evidence.

9. The matter thus once more comes before me.

10. In preparation for the hearing I noticed that the direction to the Secretary of State had not been complied with in relation to the nature of the Appellant's leave. After making enquiries of the Home Office a letter was then produced to the Upper Tribunal and the Appellant's representatives. That was a letter addressed to the Appellant dated 22nd March 2013 informing him that due to an administrative error in producing his immigration status document it stated refugee leave when it was supposed to state discretionary leave and that the status document is incorrect. He was asked to return that document in order to be issued with the correct paperwork.

11. The Appellant's representative was unaware of this until the day of the hearing.

12. Mrs Heath's instructions, notwithstanding the administrative error were that the Appellant had not been granted refugee status and the Secretary of State wished to defend the asylum appeal.

13. On the Appellant's behalf an additional expert report had been provided. I indicated that insofar as it sought to go behind the credibility findings of the First-tier Tribunal with regard to the Appellant's risk on return it was of no assistance. The issues before me were somewhat limited by intervening events. When I originally heard the case and identified the difficulties with regard to the Appellant's nationality, he then had no leave and therefore it was important to establish whether he was entitled to asylum, humanitarian protection or should succeed on human rights grounds. All that is now left however is asylum and humanitarian protection. He has been found to not be at risk in his home area. The only ground left him therefore is that he is stateless. The expert indicated that the area from which the Appellant came was one under the control of the Polisario. However, the Polisario is not a recognised government and Western Sahara is an area which falls partly in three countries namely Algeria, Morocco and Mauritania. In order to be stateless the Appellant must show that he is not a national of any of those. The nearest town to where the Appellant lived is Tindouf. Tindouf is in Algeria. The Appellant's evidence as to the language spoken and currency used in his home area would also suggest he came from Algeria. However, the Appellant's case is he does not know what country he is from. However, he cannot, without more, succeed in his claim to be stateless. The burden of proof rests with him and it is well established by case law that before a person can be regarded as stateless, they must have made an application for nationality to those countries with which they have the closest connection. In PA and others (Kuwait) CG [2004] UKIAT 00256 the Tribunal said that the burden of proof rests on a claimant to prove nationality or lack of it and persons who failed to avail themselves of opportunities to acquire nationality of the country would not normally be prevented from being considered as nationals of that country for Refugee Convention purposes.

14. It is acknowledged on the Appellant's behalf that he has not made any efforts to obtain nationality of any of the relevant countries and therefore I am unable to find that he is stateless.

15. However, even if the Appellant were stateless that would not allow him to succeed in his asylum appeal. Statelessness and refugee status are not the same thing. A fear of persecution is a pre-requisite to the grant of refugee status and a stateless person who is unable to return to the country of his former habitual residence is not, by reason of that fact alone, a refugee within the meaning of the Refugee Convention. In KA (statelessness: meaning and relevance) stateless [2008] UKAIT 00042 the Tribunal held that (i) statelessness does not of itself constitute persecution, although the circumstances in which a person has been deprived of citizenship may be a guide to the circumstances likely to attend his life as a noncitizen and (ii) the Refugee Convention uses nationality as one of the criteria for the identification of refugees: there is no relevant criterion of "effective" nationality for this purpose.

16. The Appellant has not been deprived of nationality. He has never sought to have it confirmed.

17. Similarly as the Appellant has not shown what country he is a national of or identified his country of habitual residence he has not shown that he can succeed under the Refugee Convention.

18. Accordingly, the Appellant's asylum claim must fail and the appeal to the Upper Tribunal must be dismissed.

Signed Dated 8th August 2013

Upper Tribunal Judge Martin