Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA007712016

THE IMMIGRATION ACTS

Heard at Newport (Columbus House)	**Decision & Reasons Promulgated**
On 25 April 2017	**On 5 May 2017**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

N A
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms S Caseley instructed by Migrant Legal Project (Cardiff)
For the Respondent: Mr S Kotas, 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. Unless the Upper Tribunal or Court directs otherwise, no report of these proceedings shall directly or indirectly identify the Appellant. This direction applies to both the appellant and to the respondent and a failure to comply with this direction could lead to Contempt of Court proceedings.

Introduction

2. The appellant claims to be a citizen of Sudan and a member of the Berti tribe. She was born on [ ] 1988. She claims to have arrived in the United Kingdom on 23 October 2015 when she claimed asylum having been encountered in the rear of a lorry.

3. The basis of her claim is that she is a non-Arab from Darfur of the Berti tribe. She claims that her husband was arrested on two occasions and ill-treated and that she was arrested and detained, most recently in December 2014, when she was accused of being involved with the Justice and Equality Movement ("JEM").

4. On 12 January 2016, the Secretary of State refused her claims for asylum, humanitarian protection and under Art 8 of the ECHR.

The Appeal to the First-tier Tribunal

5. The appellant appealed to the First-tier Tribunal. In a decision sent on 15 August 2016, Judge Burnett dismissed the appellant's appeal on all grounds. He made an adverse credibility finding and did not accept that she was a member of the Berti tribe or that she had been arrested and detained as she claimed.

The Appeal to the Upper Tribunal

6. The appellant sought permission to appeal to the Upper Tribunal on six grounds challenging the judge's adverse credibility finding, including that he did not accept that she was a member of the Berti tribe.

7. Permission to appeal was granted by the First-tier Tribunal (Judge Ransley) on 20 September 2016.

8. The Secretary of State initially filed a rule 24 response on 20 October 2016 conceding that the judge had erred in law. However, on 28 October 2016 a further rule 24 response was served seeking to uphold the judge's adverse findings.

9. Before me, Ms Caseley, who represented the appellant, did not seek to take any point against the Secretary of State on the basis that there were two rule 24 notices and accepted that the Secretary of State was entitled to rely upon the notice of 28 October 2016 and seek to defend Judge Burnett's decision in the Upper Tribunal.

The Judge's Decision

10. The judge's findings and conclusions are set out at paras 35-51 of his determination. The central passages are as follows.

11. At para 36, the judge noted that the appellant's credibility was "an important aspect of this appeal". He then stated: "I have taken into

account that the appellant is a vulnerable individual when making my assessment". He then noted the Presidential Guidelines on vulnerable witnesses and set out, in some detail, the proper approach when considering expert evidence derived from the decision of JL (Medical Reports – Credibility) China [2013] UKUT 00145 (IAC) to which he was referred by the appellant's (then) Counsel.

12. At paras 38-39, the judge summarised aspects of Dr Battersby's report including what the appellant had told Dr Battersby about her claimed experiences in Sudan and what was said about the relevance of Dr Battersby's evidence that the appellant suffered from PTSD to explain inconsistencies in the appellant's evidence:

> "38. The expert records the appellant's account leading to her current situation. The doctor asked her about events in 2014. The appellant described her situation to the doctor that she was arrested at home and the authorities accused her of knowing where her husband was. The appellant stated that she was kept in detention for 15 days. I noted that this was [not] the account which the appellant recounted to the Home Office when she was arrested collecting clothes to donate for charity. I raised this apparent inconsistent with the parties at the start of the hearing. Mr McWatters asked the appellant about this apparent inconsistency during the hearing. When making submissions Mr McWatters did not wish to state anything further regarding this particular aspect other than repeating that the appellant suffered from PTSD and so I should carefully assess the appellant's evidence as a vulnerable person.
>
> 39. The doctor stated that the appellant coped relatively well in her interview with the doctor. She also stated that the appellant understood the Tribunal process and had the capacity to fully participate in it. She stated that the appellant had briefly dissociated during her interview with the appellant and that the appellant may do this during any Tribunal hearing. It was also stated that the cogency of the appellant's evidence maybe effected by her moderate PTSD. I have taken this into account in assessing the appellant's evidence and the cogency of it."

I have inserted into para 38 the word "not" which was clearly omitted by the judge as the sense of that passage makes clear.

13. Then at paras 40-41, the judge dealt with the appellant's evidence concerning her claimed arrest and detention in December 2014. The judge noted an inconsistency in that evidence:

> "40. The appellant described in her interview with the Home Office her arrest in December 2014. She was asked a number of questions about her arrest and detention. She stated she was detained for 15 days. She stated she was accused of being part of the Justice and Equality movement. She stated she was with 10 other people when she was detained. She then said 'four [of them] they attacked us in our house'. She stated she was asked why she was assisting these people. She later in the interview stated she had experienced other problems because of her husband. From questions 90-99 the appellant answered questions about problems she had faced as a result of her husband. She stated she had been detained twice. Once for just the day. The other occasion for two days. The appellant did not relate at any time the 15 day

detention to her problems about her husband in the interview. This is at striking odds to the account recorded by the doctor. I note that the account the appellant gave to her solicitors and recorded in her statement for the appeal hearing is that given in her home office interview save she adds that the authorities stated to her that she knew where her husband was in respect of the arrest in December 2014.

41. The appellant also states although she was released to sign at the police station, she only went twice and then left Sudan on 5th June 2015."

14. At paras 42-47, the judge dealt with the appellant's evidence in particular in relation to her claim to be a member of the Berti tribe and concluded that her lack of knowledge and inconsistencies in her evidence were not explained by the fact that she was a vulnerable witness suffering from PTSD:

"42. The appellant states she is a member of the Berti tribe. She lived with her father. She also stated she had an older sister and a younger brother. She did not recount any problems faced by any of these individuals that could be classed as persecution.

43. The appellant stated that she had only met one other Berti in the UK and he was an interpreter. I find this very surprising. The Tribunal hears numerous appeals from people from Sudan and from non-Arab tribes' people. The appellant has provided no supporting statement or other information from anyone else to support her claims. There is no expert report provided to support her assertion that she is a non-Arab Berti tribe member.

44. The appellant did not know the answers to basic questions about the Berti such as whether they cultivate any crops, when she was question by the respondent in her substantive asylum interview. The appellant notably changed her answer at the hearing to stating that they did cultivate crops (*'grow seeds in the land'*). She also stated that the Berti are Goat Shepherds where background information records as the respondent asserted in the RFRL.

45. It is difficult to make an appraisal that a person is a member of a particular tribe by conducting a general knowledge quiz. I must look carefully though at the appellant's credibility as a witness and consider whether I accept her evidence and statement that he is a member of the Berti tribe.

46. In forming my decision in respect of the credibility of the appellant's account I have taken into account the points made in the RFRL. I note that the date recorded as to the appellant's release. 1st July ie 01/07 which is the American date form for 7th January. The appellant corrected this date in her statement. The date, 1st January, would be consistent with a 15 day detention from 22nd December 2014. I do not give this point any weight in my assessment.

47. However, the inconsistencies I have identified above lead me to the conclusion that I do not accept the appellant as a credible witness. I have had very careful regard to the assessment of the doctor and her detailed report. I have noted a discrepancy with the appellant's account told to the doctor and that told to the Home Office and in her statement prepared for the appeal. I have considered whether the inconsistencies could be explained by the appellant being a vulnerable witness suffering

> from PTSD. This does not however explain her lack of basic knowledge of the Berti."

15. At para 48 the judge added a further point concerning the implausibility of the appellant and her family experiencing no difficulties despite her failing to comply with a requirement to sign on at the police station and leaving the country five months later as follows:

> "48. It is also not plausible or credible that if the appellant was required to sign at the police station and that she only signed twice and left the country 5 months later, that she would not have faced further problems from the authorities. I also note that the appellant does not describe any difficulties for her wider family in terms of persecution as non-Arab tribes' people."

16. Then at para 49, the judge dealt with s.8 of the Asylum and Immigration (treatment of Claimants, etc) Act 2004 and considered that the appellant's failure to claim asylum en route to the UK was damaging of her credibility.

> "49. I am required to take into account section 8 AITCA. The appellant passed through a number of European countries and did not claim asylum. I am required by the Act to take this into account as damaging her credibility."

17. At para 50 the judge reached the following adverse finding:

> "50. I have taken a holistic approach to the totality of the evidence. I do not find that the appellant is a credible witness. I reject her evidence entirely. Applying the lower standard of proof in asylum claims, I find that the appellant has not provided a credible claim to asylum."

18. On the basis of that finding, the judge dismissed the appellant's appeal.

The Submissions

19. Ms Caseley relied upon the six grounds upon which permission to appeal was granted and which she expanded upon in her oral submissions.

20. First, the judge failed properly to take into account the expert psychiatric report of Dr Battersby. Ms Caseley made three points. First, the judge failed to indicate which parts of the report he accepted and which parts he rejected. In particular, the judge failed to make clear whether he accepted that the appellant suffered from PTSD. Secondly, the judge failed to take into account Dr Battersby's opinion (at A27 of the bundle) that the appellant's behaviour "was highly consistent with someone who had experienced a highly significant traumatic experience". Thirdly, and drawing on the third ground of appeal, Ms Caseley submitted that the judge failed to take into account Dr Battersby's report in assessing whether the appellant's PTSD might explain inconsistencies in the appellant's evidence and also her lack of knowledge of the Berti tribe.

21. Secondly, Ms Caseley submitted that the judge was wrong in para 48 to conclude that it was implausible that neither the appellant nor her family experienced any difficulties despite her failure to sign at the police station

as she was required after her release and having left Sudan five months later. Ms Caseley relied upon the Court of Appeal's decision in HK (Sierra Leone) v SSHD [2006] EWCA Civ 1037 where, at [29] and [30] Neuberger LJ cautioned against relying upon implausibility as a reason for disbelieving an account without reference to "customs and circumstances" which might be very different in another society.

22. Thirdly, Ms Caseley submitted that the judge had taken into account deficiencies in the appellant's knowledge about the Berti but had not taken into account that in her interview she had given some answers that were correct. Ms Caseley also raised the issue of whether the answers relied upon by the judge were, in fact, inaccurate.

23. Fourthly, Ms Caseley submitted that the judge was wrong to require, in effect, corroboration of the appellant's evidence when he had stated at para 43 that she had not provided any supporting statement from anyone else and no expert report in respect of her claim to be a non-Arab from Darfur.

24. Fifthly, Ms Caseley submitted that the judge wrongly applied s.8 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 (the "2004 Act") when he concluded in para 49 that he was "required" to take into account as damaging of the appellant's credibility the fact that she had passed through a number of European countries and had not claimed asylum.

25. Mr Kotas, on behalf of the respondent, submitted that the judge disbelieved the appellant due to her lack of knowledge about the Berti tribe and because of inconsistencies in her evidence. He submitted that the judge had not failed to have regard to Dr Battersby's report. He submitted that it had been accepted before the judge that the appellant suffered from PTSD. The judge had specifically set out Counsel's submissions made on behalf of the appellant in relation to the assessment of her evidence in the light of Dr Battersby's report. The judge acknowledged, Mr Kotas submitted, that the appellant was a "vulnerable witness". He had correctly directed himself in relation to the approach to expert medical evidence citing at paras 36 and 37 in some detail the case of JL. Further, the judge had properly dealt with Dr Battersby's evidence at paras 38 and 39 and had specifically taken it into account as he set out in para 47. Mr Kotas submitted that the judge had looked at the evidence correctly in the round in reaching his adverse findings.

26. Secondly, Mr Kotas submitted that it was properly open to the judge to find that it was not plausible that the appellant and her family would experience no difficulties when she failed to comply with her obligation to sign at the police station. There was nothing to suggest otherwise and the inference was properly open to the judge on the evidence.

27. Thirdly, Mr Kotas submitted that the judge reached his adverse findings not only on the basis of inconsistencies in the appellant's account but also

her lack of knowledge. Mr Kotas submitted that he was entitled to take into account the appellant's lack of knowledge. He pointed out that Dr Battersby's evidence was not based upon instructions dealing specifically with the effect of her PTSD upon her lack of knowledge. The judge had taken the report into account but he could not be criticised for failing to do so in respect of her lack of knowledge as the expert did not deal with this.

28. Fifthly, Mr Kotas submitted that the judge had not required, inappropriately, corroboration of the appellant's account. In para 43, the judge was simply recognising that the appellant had not produced an expert report and that there was no supporting evidence to 'back up' what she said.

29. Finally, Mr Kotas submitted that the judge was entitled under s.8 of the 2004 Act to take into account the fact that the appellant had not claimed asylum in a number of European countries through which she had passed before arriving in the UK.

Discussion

30. I deal first with Ms Caseley's points raised in relation to the judge's treatment of Dr Battersby's evidence.

31. First, it is clear that the judge had well in mind the submissions made by the appellant's (then) Counsel that Dr Battersby's report was relevant in two respects: first, her view that the appellant's symptoms were "highly consistent" with the events she described and, secondly that in assessing inconsistencies in the appellant's evidence regard should be had to her PTSD. Judge Burnett set out those submissions at para 29 of his determination. In reaching his findings, the judge directed himself (correctly) that he must have regard to the appellant being a "vulnerable individual" in para 36, again referring to the submissions made on the appellant's behalf and Dr Battersby's evidence at paras 38 and 39 before concluding at para 47 that having had "very careful regard" to Dr Battersby's assessment and report, he was not satisfied that the inconsistencies in the appellant's account could not be explained on the basis of her PTSD and further did not explain her "lack of basic knowledge" of the Berti.

32. Ms Caseley relied upon the cases of Ibrahim v SSHD (1998) INLR 511 and R (AM) v SSHD [2012] EWCA Civ 521 that proper account must be taken of an expert as independent evidence. It is plain that the judge accepted, as was the position of the Presenting Officer before the judge (see para 28), the evidence of Dr Battersby, in particular that the appellant suffered from PTSD. It is also clear on any fair reading of Judge Burnett's decision that he did take Dr Battersby's evidence into account.

33. As regards the inconsistencies in the appellant's evidence, it was open to the judge to conclude that the inconsistencies in the evidence set out at paras 38 and 40 were not satisfactorily explained by her suffering from

PTSD. The appellant had given different accounts concerning her claimed arrest and detention in December 2014 to Dr Battersby and in her asylum interview and subsequent evidence. It was significant that in the former account she had told Dr Battersby that the authorities were interested in her because of her husband whilst in her interview and subsequent evidence her arrest and detention was not said to relate to any problem arising from her husband's activities. Rather, she was accused of being part of the JEM.

34. Further, I do not accept Ms Caseley's submission that the judge failed to take into account Dr Battersby's opinion that the appellant's condition was "highly consistent" with the events she claimed occurred. The judge clearly had this well in mind in para 29 of his determination. Dr Battersby's evidence was not determinative. Indeed, in relation to the appellant's "depressive illness" at page A20 of the bundle Dr Battersby, in her report, noted that it "could equally be caused by the stress of her situation".

35. In my judgment, Judge Burnett properly took into account Dr Battersby's evidence both in assessing the inconsistencies in her evidence and also Dr Battersby's opinion concerning the consistency of the appellant's symptoms with her claim.

36. Of course, Judge Burnett also relied upon the appellant's lack of knowledge about the Berti tribe. Mr Kotas submitted that Dr Battersby's report was not relevant to explain that lack of knowledge as she had not been asked to comment upon this aspect of the Secretary of State's reasoning which was subsequently adopted by Judge Burnett. Ms Caseley submitted that although the lack of knowledge issue was not specifically part of Dr Battersby's instructions her opinion that the appellant's PTSD might affect her evidence was covered by her report which dealt with "internally inconsistent statements" relied on adversely to her credibility (see A30-A31 of the bundle). Ms Caseley relied on the point made by Judge Burnett at para 44 that the appellant had changed her evidence concerning what, if any, crops were cultivated by the Berti. That was an inconsistency in her evidence.

37. To the extent that the judge relied on the appellant's change of evidence at the hearing and set out at para 44, it is clear that he fully had regard to Dr Battersby's opinion of the effect, if any, of the appellant's PTSD upon her evidence. However, the Secretary of State identified a number of answers given by the appellant in her asylum interview which were inconsistent with the background evidence at paras 16-19. These included that the Berti tribe had never had its own language, that they were traditionally goat shepherds and did not traditionally cultivate any particular crops, their homeland was known as Mellit and that there were no Berti ministers in the current government or parliament. Judge Burnett clearly had in mind what was said in paras 16-19 of the refusal letter when at para 44 he stated that the appellant did not know answers to basic

questions about the Berti "such as" and then referring to the appellant's answer relating to crops and the Berti being goat shepherds.

38. In my judgment, it was properly open to Judge Burnett to conclude that the lack of knowledge by the appellant adversely affected her credibility, in particular her claim to be a member of the Berti tribe. He was entitled to make that finding despite what was said by Dr Battersby about the possible effect upon the appellant of her PTSD.

39. Ms Caseley raised in her submissions, for the first time the suggestion that the appellant's answers were not shown to be incorrect. As I pointed out to Ms Caseley during her submissions, the points made by the Secretary of State at paras 16-19 are supported by footnote references to a number of documents. Two of those, at least extracts from them, are contained within the respondent's bundle. It is clear that it was no part of the appellant's case before Judge Burnett that her answers in interview, which were said to be inaccurate, were in fact correct. Her (then) Counsel's skeleton argument does not suggest otherwise. It was part of the respondent's case before Judge Burnett that the answers were inaccurate and the appellant's (then) Counsel did not in his oral submissions (summarised at paras 29 and 30 of the determination) seek to argue the contrary. Rather, he relied upon Dr Battersby's report to explain any deficiencies in the appellant's evidence. Neither the appellant's witness statement dated 3 May 2016 nor her oral evidence before the judge contended that her answers in interview were correct. Indeed, she changed one of her answers in oral evidence – in relation to crops grown by the Berti – to be consistent with what the respondent said was the position. I see no basis upon which it can be said that the judge erred in law in taking into account the appellant's lack of knowledge concerning the Berti tribe in assessing her credibility and, in particular, whether she was a member of that tribe.

40. In her submissions, Ms Caseley also contended that the judge had failed to take into account that some of the answers given by the appellant about her tribe were consistent with the background evidence. The judge was clearly alive to this point. At para 11 of his determination, the judge referred to the respondent's refusal decision noting that: "Some of the answers that the appellant gave were broadly consistent with background country evidence i.e. where they traditionally live". I do not accept Ms Caseley's submission that in reaching his adverse finding the judge failed to take into account that not all of the appellant's answers were incorrect.

41. For these reasons, I reject Ms Caseley's submissions based upon the judge's failure to properly consider the psychiatric report of Dr Battersby, and in addition, in assessing the evidence of the appellant concerning her claimed membership of the Berti tribe.

42. I now turn to the other points raised by Ms Caseley.

43. Ms Caseley challenged the judge's reasoning in para 48 (set out above) that it was not plausible that the appellant and her family would experience no difficulties from the authorities once she failed to sign at the police station and after she had left Sudan five months later. Ms Caseley referred me to the Court of Appeal's decision in HK (Sierra Leone) v SSHD on the dangers of relying on "inherent probability" in asylum cases.

44. It is not necessarily impermissible for a judge to rely in his or her reasoning on an aspect of an appellant's account as being impermissible (see Y v SSHD [2006] EWCA Civ 1223 *per* Keene LJ at [26]). There are, however, dangers in doing so and caution is required. In Y, having referred to HK, Keene LJ identified the dangers (at [27]):

> "A decision maker is entitled to regard an account as incredible by such standards, but he must take care not to do so merely because it would not seem reasonable if it had happened in this country. In essence, he must look through the spectacles provided by the information he has about conditions in the country in question."

45. Where a judge has recourse to reasoning which, expressly or implicitly, doubts the plausibility or possibility of the events occurring as an individual claims, in the absence of other evidence such as documents to substantiate that reasoning, the judge runs the risk that his or her conclusion or a purported commonsense conclusion which does not stand up to objective scrutiny. However, the implausibility of an individual's account may form part of the reasoning leading a judge to reject an individual's account as true. A judge must always bear in mind that sometimes the implausible happens. The more features of an appellant's account that are implausible, the more likely it is that the appellant's account cannot stand up to scrutiny.

46. Whilst it is true that Judge Burnett did not refer to the background material relating to Sudan, Ms Caseley did not identify any background material which would contradict the inference drawn by the judge. In fact, the judge had a number of background documents before him in the appellant's bundle including the *US Department of State: Sudan 2015 Human Rights Report* and the *Operational Guidance Note, Republic of the Sudan* (August 2012). Both of those documents speak to the continued human rights infringements against, in particular, non-Arab Darfurian and also the continued arrest, detention and ill-treatment by government forces including the security forces. If, as the appellant claimed, she was perceived as connected to the JEM either personally or through her husband, it was a reasonable inference open to the judge that, having been released from detention over a fifteen day period and required to sign at a police station, when she subsequently failed to do so and left the country five months later it was implausible that neither she nor her family faced any problems from the authorities.

47. Turning to Ms Caseley's submission that the judge wrongly required corroborative evidence of the appellant's claim, a fair reading of para 43

does not support that contention. In para 43 (set out above) the judge was, in my judgment, doing no more than observing that there was no supporting evidence from individuals or an expert in relation to the appellant's claim to be a member of the Berti tribe. It was no more than a statement that the appellant's claim was unsupported by evidence of either type. That was evidence which, certainly as regards the expert report, could have readily been obtained and the judge was entitled to take that into account (see TK (Burundi) v SSHD [2009] EWCA Civ 40). If the judge had, as Ms Caseley submits, required the appellant to provide corroborative evidence, its absence would have been determinative of his findings. It is clear that what he said in para 43 did not have that affect. The judge looked at all the evidence, noting the absence of supporting evidence, in reaching his adverse credibility finding.

48. The final point raised by Ms Caseley concerned s.8 of the 2004 Act. She submitted that in para 49 the judge had been wrong to say that the appellant's failure to claim asylum despite travelling through a number of European countries "required" him to take that into account as damaging her credibility.

49. Section 8 of the 2004 Act identifies a number of "behaviours" which must be taken into account in assessing a claimant's credibility. Section 8(4) applies to a "failure by the claimant to take advantage of a reasonable opportunity to make an asylum claim or human rights claim while in a safe country." In JT (Cameroon) v SSHD [2008] EWCA Civ 878, to which Ms Caseley referred me, the Court of Appeal interpreted s.8 of the 2004 Act as requiring the various "behaviours" to be taken into account as "potentially" damaging of a claimant's credibility. Ms Caseley submitted that the appellant had given an explanation why she had not claimed asylum whilst travelling. That is set out at para 28 of her witness statement where it is stated that: "I was with a group of people and we were advised by other asylum seekers to carry on our journey to the UK because it was safer here than anywhere else." The appellant goes on to say that when they reached Calais they were mistreated by the police.

50. It is far from clear that any submissions were made on the appellant's behalf in relation to s.8 before Judge Burnett. No mention of s.8 is made by the appellant's (then) Counsel in his skeleton argument and the judge's summary of his oral submissions again makes no reference to s.8. In any event, even if the judge's attention had been specifically drawn to the appellant's explanation in her witness statement, he would have been fully entitled to reject it as a reasonable explanation of why she did not claim asylum. Having done so the "potentiality" of her behaviour "damaging" (though not necessarily 'destroying') her credibility matured into her credibility being damaged by her failure. But, it was only a factor in the judge's reasoning. Given the judge's other reasons set out in his determination at paras 36-48, I am satisfied that, even if his failure to consider her explanation amounted to a misdirection and application of s.8 of the 2004 Act, that was not a material factor which would have affected his adverse credibility finding and dismissal of the appellant's appeal.

51. For these reasons, I reject Ms Caseley's submissions. Judge Burnett did not materially err in law in reaching his adverse credibility finding and in dismissing the appellant's appeal on all grounds.

Decision

52. The decision of the First-tier Tribunal to dismiss the appellant's appeal did not involve the making of a material error of law and the decision stands.

53. Accordingly, the appellant's appeal to the Upper Tribunal is dismissed.

Signed

A Grubb
Judge of the Upper Tribunal

Date 3 May 2017